No. 91-7749-CFY
Status: GRANTED

Title: Jose Antonio Ortega-Rodriguez, Petitioner
v.
United States

Docketed:
March 17, 1992

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Abrams,Stewart G.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 17 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Apr 17 1992		Order extending time to file response to petition until May 22, 1992.
6	May 26 1992		Brief of respondent United States filed.
5	May 28 1992		DISTRIBUTED. June 12, 1992
8	Jun 15 1992		Petition GRANTED.
			**********
10	Jul 16 1992		Order extending time to file brief of petitioner on the merits until August 13, 1992.
11	Aug 11 1992		Joint appendix filed.
12	Aug 24 1992		Record filed.
		*	Certified proceedings U. S. Court of Appeals, Eleventh Circuit and U. S. District Court, S. District, Florida.
13	Sep 2 1992		Brief of petitioner Ortega-Rodriguez filed.
14	Sep 21 1992		Brief of respondent United States filed.
15	Oct 13 1992		SET FOR ARGUMENT MONDAY, DECEMDER 7, 1992. (4TH CASE).
16	Oct 15 1992		CIRCULATED.
17	Oct 27 1992	X	Reply brief of petitioner filed.
18	Dec 7 1992		ARGUED.

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
MAR 17 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NUMBER _____

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Jose Antonio Ortega-Rodriguez, through counsel and pursuant to Rule 46.1 of the Supreme Court Rules, respectfully moves for leave to file the accompanying Petition for Writ of Certiorari in the Supreme Court of the United States without payment of costs, and to proceed in forma pauperis.

Petitioner has previously been found financially unable to obtain counsel, and the Federal Public Defender was appointed to represent him pursuant to Title 18, United States Code, Section 3006A; therefore, the Petitioner relies upon Title 18, United States Code, Section 3006(d)(6) and has not attached the affidavit which would otherwise be required by Title 28, United States Code, Section 1915(a).

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

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IN THE
SUPREME COURT OF THE UNITED STATES

NUMBER _____

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a convicted individual who is sentenced to a prison term of 188 months, but whose identically situated co-defendant has been released from incarceration upon a finding by the Court of Appeals that the evidence was insufficient to support conviction, is per se barred from appellate review from his conviction if he voluntarily absents himself prior to sentencing despite a conviction and consecutive sentence for his failure to appear.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the UNITED STATES OF AMERICA and JOSE ANTONIO ORTEGA-RODRIGUEZ as Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES

NUMBER _____

JOSE ANTONIO ORTEGA-RODRIGUEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE UNITED STATES

Jose Antonio Ortega-Rodriguez, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the orders of the United States Court of Appeals for the Eleventh Circuit rendered and entered in Case No. 91-5083 on July 19, 1991 and January 22, 1992 by which the government's motion to dismiss Mr. Ortega's appeal was granted (July 19, 1991) and Mr. Ortega's motion to reinstate his appeal was denied (January 22, 1992).

OPINION BELOW

A copy of the order entered by the Eleventh Circuit Court of Appeals by which the government's motion to dismiss Mr. Ortega's appeal was granted is attached as Appendix I. A copy of the Eleventh Circuit Court of Appeal's Order of January 22, 1992 by which Mr. Ortega's Motion to reinstate appeal was denied is attached hereto as Appendix II.

BASIS FOR JURISDICTION

The Judgments giving rise to this Petition for a Writ of Certiorari were rendered on July 19, 1991 and January 22, 1992. Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Course of Proceedings

On November 16, 1988 Mr. Ortega, along with co-defendants Mieres-Borges and Becerra-Flores, was charged by indictment with possession with intent to distribute in excess of five kilograms of cocaine on board a United States registered vessel and with conspiracy to commit the aforesaid act in violation of Title 46, United States Code Appendix, Sections 1903(a) and (j) respectively.

On March 29, 1989 Mr. Ortega and his co-defendants proceeded to trial. Co-defendant Mieres-Borges made an inculpatory post-arrest statement while Mr. Ortega and co-defendant Becerra-Flores remained silent. Consequently, the district court bifurcated the trial and the jury heard evidence as to all defendants without Mieres' inculpatory statement, entertained closing argument and then deliberated as to Mr. Ortega and Mr. Becerra-Flores. After delivering a verdict which was sealed by the district court, the jury then heard evidence pertaining to Mieres-Borges' statement. The jury then deliberated as to co-defendant Mieres-Borges and a verdict was returned accordingly. On March 24, 1989 all defendants were found guilty as to both charges. Mr. Ortega and his co-defendants were permitted to remain on bond pending sentencing.

On June 22, 1989 Mr. Ortega did not appear for sentencing. Mr. Ortega, over defense objection, was sentenced *in absentia* by the district court to a term of imprisonment of 235

months as to counts I and II to be served concurrently. His period of incarceration was to be followed by a five year term of supervised release. In addition, a special assessment of $100.00 was imposed.

On or about May 25, 1990 Mr. Ortega was arrested and remanded to the custody of the United States Marshal. On June 7, 1990 Mr. Ortega filed his Motion to Vacate Sentence and for Resentencing. This motion was granted by the district court.

Between June 22, 1989 (the date on which Mr. Ortega was sentenced *in absentia*) and May 25, 1990 (the date on which Mr. Ortega was arrested and remanded to the custody of the United States Marshal), co-defendants Mieres-Borges and Becerra-Flores appealed their respective convictions to the United States Court of Appeals for the Eleventh Circuit. On December 18, 1990 the Eleventh Circuit reversed the conviction of co-defendant Becerra-Flores who, in a factual context, was situated identically to Mr. Ortega in terms of the trial record in the instant case. *See United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990) (appended hereto as Appendix III).

On January 9, 1991 Mr. Ortega filed his Motion for Judgment of Acquittal based on the *Mieres-Borges* decision. This motion was denied by the district court on January 11, 1991, whereupon Mr. Ortega was sentenced to the custody of the Bureau of Prisons for a term of 188 months as to Counts I and II. This term was to be followed by a five year period of supervised release.

On January 28, 1991 Mr. Ortega filed his Notice of Appeal. His appellate brief was filed on April 24, 1991.

On May 15, 1991, the government moved to dismiss Mr. Ortega's appeal. The government argued that because Mr. Ortega fled after conviction but before sentencing, he waived his right to appeal unless he could establish that his absence was due to matters completely beyond his control. On May 21, 1991 Mr. Ortega responded to the government's motion and offered legal and equitable argument as to why the Court of Appeals could and should reach the merits of his appeal.

On July 19, 1991 the Eleventh Circuit entered its order whereby the government's motion to dismiss Mr. Ortega's appeal was granted. (Appendix I).

On August 9, 1991 Mr. Ortega then filed his motion to reinstate his appeal. Again Mr. Ortega noted that he was and is situated identically to co-defendant Becerra-Flores whose convictions were reversed by the Court of Appeals. The sole difference between Mr. Ortega and Mr. Becerra-Flores in regard to the record before the district court is that Mr. Ortega voluntarily absented himself from court when he was to be sentenced. Mr. Ortega also noted that he was charged by separate indictment for his failure to appear for sentencing. He was convicted of this offense and received a sentence of 21 months to be served consecutively to that which was imposed in the underlying case.

The government responded to Mr. Ortega's motion to reinstate appeal and again stated that per Eleventh Circuit case

law Mr. Ortega had waived his right to appeal by his voluntary failure to appear for sentencing. The government was cognizant of the decision in the *Mieres-Borges* appeal and that Mr. Ortega and Mr. Becerra-Flores were factually indistinguishable.

On January 22, 1992 Mr. Ortega's motion to reinstate his appeal was denied. (Appendix II). As a result, Mr. Ortega presently is in the midst of service of a sentence of 188 months for the precise conduct which the Eleventh Circuit Court of Appeals has determined constituted insufficient proof of a crime. His identically situated former co-defendant Becerra-Flores has been released from incarceration. The sole difference factually between Mr. Ortega and Mr. Becerra-Flores is that Becerra-Flores appeared for sentencing. Mr. Ortega has received an additional 21 months of incarceration for his failure to appear which would remain undisturbed if Mr. Ortega prevails in his appeal.

LEGAL ARGUMENT

In its Motion to Dismiss Mr. Ortega's appeal, the government relies on the Eleventh Circuit cases of *United States v. London*, 723 F.2d 1538 (11th Cir. 1984) and *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982) which provide that where the defendant fled after conviction, but before sentencing, he "waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." *London* at 1539, quoting *Holmes* at 1373. Mr. Ortega was unable to

demonstrate that his absence was "involuntary". Consequently, his appeal was dismissed.

The First Circuit has had the opportunity to visit the precise question at bar. In *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988), the defendant was situated virtually identically to Mr. Ortega in that after conviction but prior to sentencing he jumped bail. Subsequently, the defendant was indicted and convicted of bond jumping and received an "on-and-after sentence".[1] Mr. Ortega similarly has received a conviction and consecutive 21 month sentence for failure to appear at his sentencing.

The *Anagnos* court expressly considered and rejected the reasoning of *London* and *Holmes* stating:

> *Anagnos'* misconduct was in the district court, and should affect consequences in that court, not in ours. **Nor do we understand the logic of the Eleventh Circuit, which would hold a defendant fleeing during trial unable to appeal errors in his conviction, but able to appeal irregularities in the sentence imposed after recapture.**

Anagnos at 2. (emphasis supplied).

Consequently, two Circuits have reached directly opposite, irreconcilable decisions based on virtually identical facts. Since Mr. Ortega's conviction and subsequent failure to appear occurred in the Eleventh Circuit and he was unable to demonstrate that his absence was involuntary, he is unable to seek appellate review of his conviction which resulted in a sentence of

[1] The *Anagnos* case does not define an "on-and-after sentence"; however, Mr. Ortega interprets this to mean that the defendant received a sentence for failure to appear which was to run consecutively to the sentence for the underlying offense.

188 months despite the fact that the case has already been considered on appeal and the conviction as to an identically situated co-defendant has been reversed. By contrast, if Mr. Ortega's conviction had occurred in the First Circuit, Mr. Ortega's appeal would be entertained. The Court would then find that Mr. Ortega was situated identically to co-defendant Becerra-Flores whose conviction was reversed and whose sentence was vacated. *See United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990). (Appendix III). The end result is that because Mr. Ortega's conviction occurred in the Eleventh Circuit he must serve 188 months in addition to his 21 month sentence for failure to appear. If this case occurred in the First Circuit, the 188 month sentence would be vacated.

Other circuits have visited the question of appellate rights of fugitives after their recapture. In *United States v. Matista*, 932 F.2d 1055 (2nd Cir. 1991), the Second Circuit provides: "there is no constitutional defect in a policy of dismissing the appeals of fugitive defendants even after their recapture... [o]f course we remain mindful that 'we have discretion to reach the merits in an appropriate case.'" *See also United States v. Persico*, 853 F.2d 134 (2nd Cir. 1988). Although the *Persico* court did not entertain the appeal of the defendant after recapture, the *Persico* court applies a "discretion" standard which is not limited to a showing of involuntary absence.

The D.C. Circuit also has analyzed the issue at bar and has reviewed the reasoning of the *Anagnos, Persico and Holmes*

courts. *See United States v. Parrish*, 887 F.2d 1107 (D.C. Cir. 1989). *Parrish* found the reasoning of the Second and Eleventh Circuits to be more persuasive than that of the First Circuit in *Anagnos*, citing such factors as disruption of the orderly operation of judicial processes within which defendants should press their claims (*Persico*, 853 F.2d at 138); the passage of time and the accompanying loss of documents and memories which may "make a meaningful appeal possible," *Holmes*, 680 F.2d at 1374, or if the appeal succeeds, the effective foreclosure of the possibility of reprosecution.

Parrish expressly does not decide the question of whether a defendant who becomes a fugitive after conviction inevitably waives his statutory right to appeal the conviction regardless of the length or the circumstances of his flight. *Id.* at 1109. *Parrish* continues that:

> [e]ven if some countervailing considerations of fairness could outweigh this irreparable harm to the Government's case, and the affront to the judicial process inherent in flight, Parrish summons none to his aid. Accordingly, we will not exercise our discretion to allow a belated appeal of his conviction.

Id. at 1109.

Parrish is distinguishable from the Eleventh Circuit case of *Holmes* and *London* in that it retains discretion to entertain a defendant's appeal for considerations of <u>fairness</u>. *Holmes* and *London* are clear that an appeal will only be entertained in the Eleventh Circuit if the defendant's failure to appear was "involuntary". Consequently, although the *Parrish* court declined

to entertain the defendant's appeal it recognized that it had the discretion to so do.

In the instant case, "countervailing considerations of fairness" strongly militate in favor of Mr. Ortega. The Eleventh Circuit has already determined that the evidence against Mr. Ortega and that for which he is presently serving a sentence of 188 months is insufficient proof of a crime. Moreover, Mr. Ortega will serve an additional 21 months for his failure to appear at sentencing, i.e. the precise conduct which presently prevents his appeal of the 188 month sentence. The sentence of 21 months would remain undisturbed even if Mr. Ortega's appeal was entertained and he prevailed before the Appellate Court.

As to the factors noted in *Parrish* which prejudice the government, Mr. Ortega was a fugitive for approximately eleven months. Although he may have disrupted the "orderly operation of the judicial processes" there has been no corresponding passage of time and loss of memory or documents which would prejudice the government. The government has prepared, filed and litigated the appeals of co-defendants Mieres and Becerra. The government tried the case against all three defendants and is well aware that Mr. Ortega is indistinguishable from Mr. Becerra in regard to the district court record. Consequently, the government suffers no prejudice as a result of the passage of time.

In regard to the "effective foreclosure of the possibility of prosecution", Mr. Ortega's case presents no such difficulty. Specifically, the sole issue on appeal is the

sufficiency of the evidence against Mr. Ortega. If the evidence is sufficient, Mr. Ortega's conviction will stand; however, if the evidence is insufficient, his conviction will be reversed and Mr. Ortega will be released from the instant case. Mr. Ortega presents no issue for review which would or could result in the necessity of a retrial.

In sum, the law of the Eleventh Circuit provides that the only way that Mr. Ortega's appeal would be entertained is if his failure to appear at sentencing was "involuntary". Through *Anagnos*, the 1st Circuit makes clear that Mr. Ortega's appeal would be entertained. The 2nd Circuit in *Persico* notes that discretion is retained to hear the appeal "in the appropriate case" and the D.C. Circuit notes that "some countervailing considerations of fairness" could also result in the exercise of discretion to entertain the appeal. Considerations of fairness demand that Mr. Ortega's appeal be entertained since as a result of a procedural principle the Eleventh Circuit has determined that Mr. Ortega should serve 188 months of incarceration in addition to the sentence which he received for his failure to appear despite its having determined previously that the government's proof against him was insufficient evidence of a crime.

Consequently, based on Eleventh Circuit precedent Mr. Ortega will serve 15 years and 8 months in jail more than his former co-defendant Becerra-Flores who was situated identically as to the trial record before the district court. If Mr. Ortega's case had come before the First Circuit his appeal have been

entertained. If he had come before the D.C. or Second Circuits the respective Courts retain discretion which was not limited to a showing of involuntary absence. The Eleventh Circuit flatly rejects review based on the facts and circumstances of the instant case which will cause Mr. Ortega to serve 188 months of incarceration despite a finding by the Court that the evidence against him was insufficient to warrant conviction.

CONCLUSION

Mr. Ortega is convicted appropriately for having failed to appear at sentencing. He has been sentenced to a period of incarceration of 21 months for this conduct which will not be disturbed by the results of any appeal in the instant case. In addition, Mr. Ortega has experienced an inappropriate, non-reviewable deprivation of liberty of 15 years and 8 months for failure to follow a procedural principle. A co-defendant situated identically to Mr. Ortega has been released from incarceration.

Had Mr. Ortega's case been tried in the First Circuit, the law is clear that his appeal would have been entertained. A subsequent opinion by that court consistent with the *Mieres* decision would have relieved Mr. Ortega from the 188 month sentence.

Had Mr. Ortega's case been tried in the Second or D.C. Circuits, the courts would have discretion to entertain the appeal upon consideration of fairness; however, absent involuntary failure

to appear, Mr. Ortega is deprived of an appeal in the Eleventh Circuit.

The government suffers no prejudice if the Eleventh Circuit entertains Mr. Ortega's appeal since the only question presented is one of sufficiency of the evidence. The result, which Mr. Ortega's anticipates would be identical to that of Mr. Becerra-Flores, would be a reversal and a dismissal. Mr. Ortega would still appropriately serve his sentence for his failure to appear.

For the foregoing reasons, Jose Antonio Ortega-Rodriguez urges the Supreme Court to grant this Petition for Writ of Certiorari so that the decisions of the lower courts may be reviewed after full briefing.

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UNITED STATES of America, Plaintiff-Appellee,

v.

Roberto MIERES-BORGES and Osvaldo Becerra-Flores, Defendants-Appellants.

No. 89-5643.

United States Court of Appeals, Eleventh Circuit.

Dec. 18, 1990.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 88-10035-CR-JLK, James Lawrence King, Chief Judge, of conspiracy to possess cocaine with intent to distribute and of possession with intent to distribute. Defendants appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) evidence supported one defendant's conviction but not second defendant's; (2) Government did not have to establish weight of cocaine as charged in indictment; and (3) for sentencing purposes, weight of cocaine only had to be proven by a preponderance of the evidence.

Reversed in part; affirmed in part.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐1139

Whether there was sufficient evidence to support conviction is question of law subject to de novo review by Court of Appeals, and court owes no special deference to findings of district court.

2. Criminal Law ⇐1144.13(3, 5)

In reviewing sufficiency of evidence to support jury verdict, Court of Appeals must view evidence in light most favorable to Government, and all reasonable inferences and credibility choices are made in Government's favor.

3. Criminal Law ⇐1159.2(7)

Court of Appeals cannot reverse conviction for insufficiency of evidence unless it concludes that no reasonable fact finder could find proof of guilt beyond a reasonable doubt.

4. Criminal Law ⇐1159.6

Test for sufficiency of the evidence is identical regardless of whether evidence is direct or circumstantial.

5. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐123(2)

Circumstantial evidence did not establish that boat passenger was part of conspiratorial agreement to possess cocaine with intent to distribute or that passenger in fact possessed cocaine with intent to distribute, notwithstanding that boat was similar to boat seen at site of air-drop of bales that were subsequently discovered on beach and determined to contain cocaine and that boat was later seen near beach but apparently fled when approached by law enforcement authorities. Maritime Drug Law Enforcement Act, § 3(a, g, j), 46 U.S.C.A.App. § 1903(a, g, j); 18 U.S.C.A. § 2.

6. Drugs and Narcotics ⇐73, 123(2)

Possession of controlled substance with intent to distribute may be shown by either direct or circumstantial evidence, and possession may be either actual or constructive.

7. Drugs and Narcotics ⇐73, 123(2)

Constructive possession of controlled substance need not be exclusive, but may be shown circumstantially through evidence of ownership, dominion, or control over premises on which substance is located.

8. Criminal Law ⇐1144.13(3, 6, 8)

Presence in area of contraband and flight must be considered along with other evidence, and reviewing court should consider whether, under totality of circumstances, there is sufficient evidence to support convictions for conspiracy and possession when facts are viewed in light most favorable to Government.

9. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐123(2)

Proximity of boat to bales of cocaine stacked on high water mark of island was

insufficient as a matter of law to allow finding of boat passenger's guilt beyond a reasonable doubt of conspiracy and possession with intent to distribute. Maritime Drug Law Enforcement Act, § 3(a, g, j), 46 U.S.C.A.App. § 1903(a, g, j); 18 U.S.C.A. § 2.

10. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐123(2)

Evidence supported one boat passenger's conviction for conspiracy and for possession of cocaine with intent to distribute even though evidence was insufficient to support conviction of second passenger; in addition to evidence concerning passengers' presence on boat seen in proximity of bales of cocaine and fact that boat apparently fled when approached by law enforcement authorities, first passenger made statement to criminal investigator indicating that bales were dropped by unknown aircraft that overflew boat's position and were picked up by passengers and put on beach. Maritime Drug Law Enforcement Act, § 3(a, g, j), 46 U.S.C.A.App. § 1903(a, g, j); 18 U.S.C.A. § 2.

11. Conspiracy ⇐43(12)
Drugs and Narcotics ⇐106

Government did not have to establish that weight of cocaine seized by law enforcement authorities exceeded five kilograms as charged in indictment in order to convict defendant under provisions of Maritime Drug Law Enforcement Act dealing with conspiracy and possession with intent to distribute. Maritime Drug Law Enforcement Act, § 3(a, j), 46 U.S.C.A.App. § 1903(a, j).

12. Criminal Law ⇐1313(2)

For purpose of determining defendant's base offense level under Sentencing Guidelines, Government had to establish weight of narcotics only by a preponderance of the evidence where statute under which defendant was convicted did not include weight or quantity as element of offense. Maritime Drug Law Enforcement Act, § 3(a, j), 46 U.S.C.A.App. § 1903(a, j); U.S.S.G. § 2D1.1(c)(6), 18 U.S.C.A.App.

13. Constitutional Law ⇐270(1)

District courts are required by due process to make factual determinations at sentencing only by a preponderance of the evidence. U.S.C.A. Const.Amend. 14.

14. Criminal Law ⇐1251

Evidence supported finding that defendant was no less culpable than codefendants such that he was entitled to base offense level reduction under Sentencing Guidelines based on his minor role in conspiracy and possession of cocaine with intent to distribute. U.S.S.G. § 3B1.2, 18 U.S.C.A.App.

Richard C. Gagliano, Miami, Fla., for Mieres-Borges.

Simon T. Steckel, Coral Gables, Fla., Mark King Leban, Miami, Fla., for Becerra-Flores.

William C. Healy, Linda Collins-Hertz and Dawn Bowen, Asst. U.S. Attys., Miami, Fla., for U.S.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

FAY, Circuit Judge:

Defendants-appellants Roberto Mieres-Borges and Osvaldo Becerra-Flores appeal their convictions in federal district court for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine and for possession with intent to distribute in excess of five kilograms of cocaine. Both appellants challenge the sufficiency of the evidence to support the jury verdicts against them. Because we find that the evidence presented at trial was insufficient to establish the guilt of Appellant Osvaldo Becerra-Flores beyond a reasonable doubt, we REVERSE his conviction

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

on both counts. Because we find that the evidence presented at trial would allow a reasonable factfinder to conclude that Appellant Roberto Mieres-Borges was guilty beyond a reasonable doubt, we SUSTAIN his conviction on both counts. In the alternative, Appellant Mieres-Borges challenges his conviction on the ground that the weight of the cocaine he possessed was not established at trial beyond a reasonable doubt. Because we find that the government was not required to establish the weight of the cocaine seized as an element of the offenses charged, we SUSTAIN his conviction on this ground as well. Finally, Appellant Mieres-Borges challenges the district court's determination of his base offense level under the United States Sentencing Guidelines. Mieres-Borges maintains that the district court erred in refusing to require proof of the weight of the cocaine beyond a reasonable doubt for purposes of sentencing, and that it erred in refusing to reduce his base offense level by two points for his minor role in the offense. For the reasons that follow, we AFFIRM the refusal of the district court to require proof of the weight of the cocaine possessed by Mieres-Borges beyond a reasonable doubt. In addition, we AFFIRM the district court's refusal to reduce the base offense level of Mieres-Borges under section 3B1.2 of the Sentencing Guidelines.

Procedural History

Appellants Roberto Mieres-Borges and Osvaldo Becerra-Flores were indicted by a federal grand jury on two counts. Count one charged appellants with possession with intent to distribute in excess of five kilograms of cocaine in violation of 46 U.S.C.App. §§ 1903(a) and 1903(g) and 18 U.S.C. § 2. Count two charged appellants with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine in violation of 46 U.S.C.App. §§ 1903(j) and 1903(g). Appellants and a co-defendant [1] were convicted by a jury on both counts. At a bifurcated trial, the jury first returned a verdict against Becerra-Flores. This verdict was sealed while the government presented additional evidence of a statement made by Mieres-Borges to a criminal investigator for the United States Customs Service. Considering this statement in addition to the evidence already presented against Becerra-Flores, the jury then returned a verdict against Mieres-Borges. Both appellants are currently incarcerated.

Factual History

On the evening of November 7, 1988, a United States Customs Service sensor aircraft [2] was launched from Homestead Air Force Base in response to information that an air drop of narcotics was to take place in the Cay Sal Bank area.[3] While conducting a radar patrol of the area, the pilot, David Sherry, responded to a specific report of an aircraft going over Cuba and flying very low to the ground. Arriving at an area just south of Cay Sal, at approximately twenty minutes before dusk, Sherry saw an aircraft circling over a vessel at a very low altitude and dropping bales. The boat was circling in the same manner as the plane and was picking up the bales as they were dropped. Sherry counted twenty bales that were dropped from the plane into the water.

Faced with the choice of whether to pursue the boat or the plane, Sherry followed the aircraft as it travelled west along Cuban airspace. Fearful of an encounter with a Cuban fighter plane, Sherry eventually abandoned his pursuit and returned to the Cay Sal Bank area to look for the vessel. When he returned after 40 minutes, the vessel could not be relocated.

Sherry described the boat as white, 40 to 50 feet in length, with tuna towers and a number of antennas. He admitted at trial, however, that there were numerous boats

1. The co-defendant fled the jurisdiction prior to sentencing and is not a party to this appeal.

2. The sensor aircraft is equipped with a radar and a forward looking infrared camera for detecting drug traffickers both in the air and on the sea.

3. The Cay Sal Bank area, and Cay Sal Island, are located midway between the Florida Keys and the island of Cuba.

in the area of southern Florida to the Bahamas matching that description. Further, the evidence at trial showed that the Customs plane was flying at an altitude of 2500 feet [4] and that visibility was not optimal. For these reasons, Sherry was unable to ascertain the name of the vessel.

A second Customs plane was launched to search for the boat at six a.m. the following morning, approximately twelve hours after Sherry first spotted the vessel. When he arrived at Cay Sal, the pilot, William Radtke, saw only one boat which resembled the vessel described by Sherry. Radtke described the boat as a 30 to 40 foot sportfishing vessel with a tuna tower, sitting approximately ten feet off of the south beach of Cay Sal. The name of the boat was the "Wilfred" from Miami, Florida.

Radtke left the boat to go to the drop point from the night before and returned to Cay Sal when he didn't see any bales or any other vessels. As he approached Cay Sal, he noticed the Wilfred was underway and heading away from the island with a cover [5] over the back of the transom hiding the name of the boat. The boat was headed toward Cuba, travelling at 30 knots.[6] Radtke then flew over Cay Sal and saw numerous rectangular bales wrapped in white plastic and stacked on the high water mark of the beach.[7] He described a set of roundtrip like footprints leading from the water to where the bales were stacked and back to the water again. The footprints leading to and from the water were in the area where the Wilfred was originally sighted by Radtke.

Radtke admitted at trial that there was a discrepancy between the size of the Wilfred, which he described as 30 to 40 feet in length, and the size of the vessel spotted by Sherry the evening before, which was described as 40 to 50 feet in length. Although Radtke testified that he saw no other boats within a 30-mile radius of the Cay Sal beach where the Wilfred was spotted, he stated that he was conducting only a visual search of the area without the benefit of radar. In addition, Radtke admitted that a boat like the Wilfred could have travelled 360 miles in the twelve hours between the time that the unidentified boat was spotted by Sherry picking up bales, and the time that the Wilfred was first identified off of Cay Sal. Radtke never saw any contraband aboard the Wilfred.

Radtke radioed Chief Quartermaster Rafael Lewis, of the United States Coast Guard, to intercept the Wilfred. Lewis spotted the Wilfred between nine and nine-thirty a.m. heading toward Cuban territorial waters at a speed of ten to fifteen knots.[8] Lewis contacted the Wilfred by radio and asked a series of standard preboarding questions. Lewis first asked what was the Wilfred's latest port of call. The captain of the Wilfred [9] responded three times that they had been at Cayo Blanco.[10] The fourth time [11] the captain changed his answer and stated that he had departed Key Largo, Florida. When Lewis asked what the Wilfred's next port of call was, the captain stated that they were headed back to Key Largo. Finally, when Lewis inquired as to the purpose of the

4. The Customs pilot testified that he did not want to fly so low as to be detected by the boat below and thereby risk destruction of any contraband the boat may have been carrying.

5. Radtke described the cover as a brown burlap cover or brown rug thrown over the back of the transom.

6. Thirty knots is the approximate equivalent of thirty-five to thirty-six miles per hour.

7. Radtke testified that he didn't see the bales on the beach when he made his first sweep over Cay Sal Island. He emphasized, however, that he wasn't at that time looking for anything but the boat spotted the evening before.

8. Ten to fifteen knots is the approximate equivalent of thirteen to eighteen miles per hour.

9. Evidence presented at trial did not reveal which of the defendants was the captain of the Wilfred.

10. Cayo Blanco is in Cuban territorial waters.

11. Lewis testified that he found it unusual for a United States vessel to be inside Cuban territorial waters. For this reason he asked the captain of the Wilfred three times to repeat his answer.

Wilfred's voyage, the captain responded that they were fishing. The Coast Guard then boarded the Wilfred to check documentation and compliance with safety regulations. Lewis testified that when asked to point to a position on the nautical chart where he had been fishing, the captain was very vague and didn't pinpoint any particular position. In addition, the captain of the Wilfred kept no nautical log on board that indicated where the Wilfred had been.[12]

A three to four hour inspection of the Wilfred revealed no contraband aboard the vessel. The Wilfred had fishing equipment on board, although the equipment was not rigged. The boat's outriggers were also not rigged. While there were no freshly caught fish on board, there was ice in the fishing box, as well as two unopened containers of bait. There was scuba gear on board, and there were fishing rigs out on deck, which were not baited. A temporary fishing license was found on the vessel, which allowed the Wilfred to fish in American waters.[13] The Wilfred's captain stated that they were fishing for dolphin.[14]

Sufficiency of the evidence

[1, 2] Whether there was sufficient evidence to support a conviction is a question of law subject to de novo review by this Court. Thus, we owe no special deference to findings of the district court. *United States v. Kelly*, 888 F.2d 732, 739-40 (11th Cir.1989) (citing *United States v. Pareja*, 876 F.2d 1567, 1568 (11th Cir.1989)). In reviewing the sufficiency of the evidence to support a jury verdict, we must view the evidence in the light most favorable to the government. *United States v. Chotas*, 913 F.2d 897, 898 (11th Cir.1990) (per curiam) (citations omitted). Thus, all reasonable inferences and credibility choices are made in the government's favor. *United States v. Kelly*, 888 F.2d at 740 (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Gregory*, 730 F.2d 692, 700 (11th Cir.1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985)).

Accepting all reasonable inferences which support the verdict, we will affirm the conviction "'if a reasonable trier of fact could conclude that the evidence establishes guilt beyond a reasonable doubt.'" *United States v. Pritchett*, 908 F.2d 816, 820 (11th Cir.1990) (citations omitted); *United States v. Chotas*, 913 F.2d at 898 (citing *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (*en banc*), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)).[15] It is not necessary "for the government to disprove every reasonable hypothesis of innocence, as the jury is 'free to choose among reasonable constructions of the evidence.'" *United States v. Jones*, 913 F.2d 1552, 1557 (11th Cir.1990) (citing *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir.1983) (quoting *United States v. Bell*, 678 F.2d at 549)). All that is necessary is that a reasonable factfinder could conclude that the evidence establishes guilt beyond a reasonable doubt. *United States v. Kelly*, 888 F.2d at 740 (citations omitted).

[3] Therefore, we cannot reverse a conviction for insufficiency of the evidence unless we conclude that no reasonable factfinder could find proof of guilt beyond a reasonable doubt. *United States v. Jones*, 913 F.2d at 1557. "If there is a lack of substantial evidence, viewed in the Government's favor, from which a reasonable factfinder could find guilt beyond a reasonable doubt, the conviction must be reversed." *United States v. Kelly*, 888 F.2d at 740 (citations omitted).

[4] The test for sufficiency of evidence is identical regardless of whether the evi-

to anticipate where they will be before going out to fish for them.

12. Lewis admitted on cross-examination that not all small boats keep such logs.

13. The license did not allow the Wilfred to fish in Cay Sal or in Cuban waters. When asked if he had been fishing in the Cay Sal Island area, the captain stated that he had not.

14. The Coast Guard officer acknowledged that because dolphin are migratory, it is impossible

15. Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in this circuit. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

dence is direct or circumstantial, and "no distinction is to be made between the weight given to either direct or circumstantial evidence." *United States v. Gonzalez*, 719 F.2d 1516, 1521 (11th Cir.1983), *cert. denied*, 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1984) (citations omitted). "Where the government seeks to meet its burden of proof on the basis of circumstantial evidence, however, it must rely on *reasonable* inferences in order to establish a prima facie case." *United States v. Villegas*, 911 F.2d 623, 628 (11th Cir.1990) (emphasis added).

Osvaldo Becerra-Flores

[5] The only evidence presented at trial against Appellant Becerra-Flores was circumstantial. In order to find Becerra-Flores guilty, therefore, a reasonable factfinder must conclude beyond a reasonable doubt, drawing reasonable inferences from such circumstantial evidence, that the appellant did possess and conspire to possess in excess of five kilograms of cocaine with the intent to distribute. We believe that the evidence presented at trial is insufficient to allow a reasonable factfinder to conclude that Becerra-Flores was guilty beyond a reasonable doubt.

Becerra-Flores was charged both with conspiracy and with the substantive crime of possession. Because evidence of possession would also serve as circumstantial evidence of the existence of a conspiratorial agreement to possess cocaine with the intent to distribute, the facts here must be analyzed with respect to the elements of both crimes.

In order to support a conviction for conspiracy, the government must prove " 'that an agreement existed between two or more people to commit a crime, that the accused had knowledge of at least the essential objectives of that agreement, and that armed with that knowledge, he voluntarily joined or participated in the illegal venture.' " *United States v. Battle*, 892 F.2d 992, 999 (11th Cir.1990) (quoting *United States v. Pantoja-Soto*, 739 F.2d 1520, 1525 (11th Cir.1984), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985)). The existence of a conspiracy may be established through direct or circumstantial evidence. *United States v. Montes-Cardenas*, 746 F.2d 771, 778 (11th Cir.1984) (citations omitted). Thus, "direct evidence of the elements of a conspiracy is not required. A defendant's knowing participation in a conspiracy may be established through proof of surrounding circumstances such as acts committed by the defendant which furthered the purpose of the conspiracy." *United States v. Bain*, 736 F.2d 1480, 1485 (11th Cir.1984), *cert. denied*, 469 U.S. 937, 105 S.Ct. 340, 83 L.Ed.2d 275 (1984) (citation omitted).

[6,7] Possession of a controlled substance with intent to distribute may also be shown by either direct or circumstantial evidence. *United States v. Pantoja-Soto*, 739 F.2d at 1525 (citing *United States v. Bustos-Guzman*, 685 F.2d 1278, 1280 (11th Cir.1982) (per curiam)). Furthermore, possession may either be actual or constructive. Constructive possession will be found where there is a " 'knowing exercise of or the knowing power or right to exercise dominion and control over the substance.' " *United States v. Poole*, 878 F.2d 1389, 1392 (11th Cir.1989) (quoting *United States v. Knight*, 705 F.2d 432, 433 (11th Cir.1983)). Even constructive possession need not be exclusive, but may be shown circumstantially through evidence of ownership, dominion, or control over the premises on which the substance is located. *Id.* (citations omitted). "[M]ere presence in the area of contraband or awareness of its location is not sufficient to establish possession." *United States v. Maspero*, 496 F.2d 1354, 1359 (5th Cir.1974).[16]

We believe that the evidence presented at trial was insufficient to allow a reasonable factfinder to conclude beyond a reasonable doubt that Becerra-Flores was part of a conspiratorial agreement to possess cocaine with the intent to distribute, or that Becerra-Flores did in fact possess cocaine with the intent to distribute. Most

16. The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

significant to Becerra-Flores' challenge to the sufficiency of the evidence against him, is the requirement that the government prove that the appellants actually entered into an agreement with the purpose of achieving an unlawful objective. *See United States v. DeSimone*, 660 F.2d 532, 537-38 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1732, 72 L.Ed.2d 149 (1982). It is well established that "[i]nferences from the conduct of the alleged participants or from other circumstantial evidence of a scheme may provide the basis for establishing that a conspiratorial agreement existed." *United States v. Pantoja-Soto*, 739 F.2d at 1525 (citations omitted). From the evidence presented at trial against Becerra-Flores, however, we are not convinced that the government met its burden by establishing the existence of a conspiratorial agreement beyond a reasonable doubt. No evidence showed that Becerra-Flores ever entered into an agreement with any other defendant to distribute cocaine. Furthermore, Becerra-Flores was not shown to have committed any acts which would further such a conspiracy.

Similarly, we believe that the government failed to establish, by and through the evidence presented against Becerra-Flores, that he did in fact possess cocaine with the intent to distribute. It is without question that Becerra-Flores was never shown to be in actual possession of any of the bales of cocaine discovered on the beach at Cay Sal. Constructive possession was also never established by the government at trial. It is simply not clear beyond a reasonable doubt that Becerra-Flores had a knowing power or right to exercise dominion and control over the bales of cocaine. Becerra-Flores was never seen on the beach with the bales of cocaine; in fact, none of the defendants aboard the Wilfred were seen with the cocaine. No evidence was presented which showed that Becerra-Flores or any other defendant ever left the Wilfred and went ashore on Cay Sal. Further, none of the defendants was shown to evince any dominion or control over the beach on which the cocaine was found. There was no evidence of any attempt to guard the beach or to prevent others from going ashore.

This circuit has declared that "[c]onspiracy implies much more than physical proximity to purported coconspirators; possession entails more than physical proximity to the controlled substance." *United States v. Pantoja-Soto*, 739 F.2d at 1526. Where, as here, the government presents no evidence of the existence of a conspiratorial agreement and no evidence that a defendant did in fact possess a controlled substance with the intent to distribute, it has not met the burden of proof necessary to convict on charges of conspiracy and possession.

[8] We recognize that the evidence presented at trial goes a long way toward establishing the defendants' presence in the area of contraband and their flight from that area when approached by law enforcement officials. We stress, however, that this alone is insufficient to support a finding of guilt beyond a reasonable doubt. It is well beyond question that mere physical presence at the scene of criminal activity is insufficient to support a finding of guilt. *United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir.1986); *United States v. Pantoja-Soto*, 739 F.2d at 1526. It is also well established that "even presence coupled with flight, without more, does not establish participation in a conspiracy." *See also United States v. Castro*, 723 F.2d 1527, 1534 (11th Cir.1984); *United States v. DeSimone*, 660 F.2d at 537; *United States v. Lopez-Ortiz*, 492 F.2d 109, 115 (5th Cir.), *cert. denied*, 419 U.S. 1052, 95 S.Ct. 630, 42 L.Ed.2d 647 (1974). Presence and flight must be considered along with other evidence, and the reviewing court should consider whether, under the totality of the circumstances, there is sufficient evidence to support a jury verdict when the facts are viewed in the light most favorable to the government. *United States v. Lopez-Llerena*, 721 F.2d 311, 312 (11th Cir. 1983) (denial of rehearing), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 132 (1984) (citing *United States v. Pintado*, 715 F.2d 1501, 1503 (11th Cir.1983); *United States v. Blasco*, 702 F.2d 1315, 1331-32

(11th Cir.), *cert. denied*, 464 U.S. 914, 104 S.Ct. 275, 276, 78 L.Ed.2d 256 (1983)).

We do not believe that sufficient evidence was presented by the government which, in addition to presence and flight, would allow a reasonable factfinder to conclude that Becerra-Flores was guilty beyond a reasonable doubt. The initial description of the vessel spotted picking up bales, given by Customs Service pilot David Sherry, provided only the very general picture of a sportfishing vessel with a tuna tower, antennas and outriggers. In the waters off of the Florida Keys, the Bahamas, and the island of Cuba, however, that general picture would match the characteristics of literally hundreds of boats. When the Wilfred was identified by Customs Service pilot William Radtke twelve hours later off of Cay Sal Island, it failed to match even the general description given by Sherry the night before. While the vessel spotted by Sherry was described as 40 to 50 feet in length, the Wilfred was later described by Radtke as only 30 to 40 feet in length.

Because Sherry was unable to ascertain the name of the vessel he saw, it is in no way clear that the Wilfred was the boat described by Sherry. Although Radtke stated that the Wilfred was the only boat he saw within a thirty mile radius, any number of boats could have moved in and out of the Cay Sal area in the twelve hours between Sherry's initial sighting and Radtke's identification of the Wilfred. Furthermore, Radtke only conducted a visual search of the Cay Sal area on the morning he spotted the Wilfred. A radar search may have revealed other vessels outside of that thirty-mile radius. Finally, while Sherry testified that he counted twenty bales being dropped from the plane into the water, only eleven bales were recovered from the beach on Cay Sal. The fact that nine bales of cocaine were unaccounted for would seem to indicate that another vessel either removed some bales from the beach, or that the vessel which picked up the bales did not deposit all of them on the beach in the first instance. Under either scenario, it becomes even harder to establish a direct connection between the Wilfred and the bales of cocaine.

The chain of events on the morning after Sherry's initial sighting of the vessel taken together present a very suspicious scenario. We do not agree, however, that this suspicious set of facts is sufficient to establish the guilt of Becerra-Flores beyond a reasonable doubt. When Radtke returned to the beach where he first saw the Wilfred, he noticed that the vessel was underway and heading away from the island with a cover over the back of the transom hiding the name of the boat. Flying over the island, Radtke for the first time noticed bales stacked on the high water mark of the beach, as well as roundtrip footprints leading from the area in the water where the Wilfred had been to the bales and back to the water.

[9] These facts, viewed in the light most favorable to the government, go a long way toward establishing both the Wilfred's presence in an area where contraband was found, as well as its flight from that area. As we have noted, however, other factors have been necessary in order to supplement the inference of guilt provided by presence. *See e.g., United States v. Bergouignan*, 764 F.2d 1503, 1509 (11th Cir.1985) (where, in addition to the defendant's presence next to a vessel containing marijuana, evidence showed that traces of marijuana residue were found on his clothing), *cert. denied*, 484 U.S. 1044, 108 S.Ct. 778, 98 L.Ed.2d 864 (1988). The proximity of the Wilfred to the bales of cocaine stacked on the high water mark of Cay Sal Island, therefore, is insufficient as a matter of law to allow a finding of guilt beyond a reasonable doubt.[17]

17. We note that even the conclusion that the Wilfred was present in the area where the cocaine was found requires an inference drawn from circumstantial evidence. To be sure, the Wilfred was first sighted by Radtke in the same area where he testified that he saw roundtrip footprints leading from the water to where the cocaine was stacked on the beach. No evidence was presented, however, which established that anyone on board the Wilfred ever left the boat to set foot on Cay Sal Island. Radtke never saw anyone on the beach. In addition, there was no physical evidence on the Wilfred, such as sand or water on deck, to indicate that anyone had left the boat, waded to shore, and then returned to the boat. And finally, no evidence was presented that the persons aboard the Wilfred were dressed in wet clothing or that wet clothes were found on board the vessel. Cases in this circuit where presence has served as a basis for establishing guilt have shown a more certain connection between defendants and contraband than exists here. *See United States v. Pantoja-Soto*, 739 F.2d at 1526 (appellants present at a service station where drugs were found in the station's service bay); *United States v. Ceballos*, 706 F.2d 1198, 1202 (11th Cir.1983) (presence found where shrimping vessel was carrying marijuana); *United States v. Villegas-Rojas*, 715 F.2d 564, 565-66 (11th Cir.1983) (defendants present on vessel carrying marijuana), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1984).

We recognize the existence of other facts, in addition to presence and flight, which implicate the defendants' guilt. However, the government did not present enough additional evidence against Becerra-Flores to support a guilty verdict. When questioned by the Coast Guard as to their latest port of call, the captain of the Wilfred changed his answer after being asked to repeat it several times. In addition, while the captain stated that the purpose of the Wilfred's trip was to fish for dolphin, he had difficulty pointing to a particular position on a nautical chart where the vessel had been fishing. While this may constitute suspicious behavior, it does not rise to the level necessary to find a conspiracy to possess cocaine, or possession of cocaine, beyond a reasonable doubt.

Once the Coast Guard intercepted the Wilfred, a three to four hour inspection of the vessel revealed no contraband aboard. The Wilfred had fishing equipment and scuba gear on board. Although the fishing equipment was not rigged and there were no freshly caught fish on board, there was ice in the fishing box, which contained two unopened boxes of bait. *Compare United States v. Ceballos*, 706 F.2d 1198, 1202 (11th Cir.1983) (where shrimping vessel carrying marijuana lacked any rigging for shrimping, this negated any inference that crew was unaware of marijuana on board and believed the purpose of their trip was to fish); *United States v. Villejas-Rojas*, 715 F.2d 564, 565-66 (where, in addition to the defendant's presence on board a vessel carrying marijuana, evidence showed that the vessel flew no flag, had no home port and had hidden its real name, had attempted to elude the Coast Guard, and had no shrimp, ice or fishing gear on board). Once again, the fact that the fishing equipment on board the Wilfred was unrigged and the boxes of bait were unopened may give rise to an inference that the Wilfred was not, in fact, fishing. This inference will not, however, support a conclusion beyond a reasonable doubt that the persons aboard the Wilfred were part of a conspiracy to possess cocaine with intent to distribute, or that they in fact possessed cocaine with intent to distribute.

Evaluating the sufficiency of evidence to support a criminal conviction often presents the reviewing court with the difficult job of drawing a clear line where none truly exists. The standard of proof which the government must meet, however, is a stringent one, and based upon the evidence presented at trial, we find that the government has not met this standard. Therefore, because we find that the evidence presented was insufficient to establish the guilt of Osvaldo Becerra-Flores beyond a reasonable doubt, we REVERSE his conviction on both counts.

Roberto Mieres-Borges

[10] Appellant Roberto Mieres-Borges also challenges the sufficiency of the evidence to support his conviction. After closing arguments in the trial of Osvaldo Becerra-Flores, the jury returned a sealed verdict with respect to Becerra-Flores. Additional evidence was then presented against Appellant Roberto Mieres-Borges, which the jury considered in conjunction with the evidence already presented against Becerra-Flores. The jury subsequently found Mieres-Borges guilty on both counts charged in the indictment.

The additional evidence presented against Mieres-Borges consisted of a statement made by Mieres-Borges to a criminal investigator for the United States Customs Service. Mieres-Borges stated that the

Wilfred was out fishing when an unknown aircraft overflew their position and began dropping packages. The persons aboard the Wilfred then picked up the packages and put them on the boat. After examining the contents of the packages, they elected to put the packages on a nearby island.

The statement made by Mieres-Borges directly links him to the cocaine found on the beach at Cay Sal, a link which was absent in the evidence presented against Becerra-Flores. In light of this additional evidence, we find that a reasonable fact-finder could conclude that Mieres-Borges was guilty beyond a reasonable doubt of conspiracy to possess cocaine with intent to distribute and of possession of cocaine with intent to distribute.

[11] Mieres-Borges argues, in the alternative, that his conviction must be overturned because the government failed to establish that the weight of the cocaine seized by the law enforcement authorities exceeded five kilograms as charged in the indictment.[18] This argument is without merit. The statute under which Mieres-Borges was convicted, 46 U.S.C.App. § 1903(a), (j),[19] does not specify any quantity or weight of cocaine as an element of the substantive offense. *See United States v. Fuentes*, 877 F.2d 895, 899 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 347, 107 L.Ed.2d 335 (1989); *United States v. Mena*, 863 F.2d 1522, 1529–30 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 109, 107 L.Ed.2d 72 (1989). Thus, it is unnecessary for the government to prove weight or quantity beyond a reasonable doubt. *United States v. Mena*, 863 F.2d at 1530. For the above reasons, therefore, we SUSTAIN the conviction of Roberto Mieres-Borges on both counts.[20]

18. Mieres-Borges raises this alternative argument by adopting the argument of Appellant Becerra-Flores on the sufficiency of evidence issue. Because we found that there was insufficient evidence to convict Becerra-Flores, it became unnecessary to reach the issue of the weight of the cocaine with respect to Becerra-Flores.

19. The statute provides that

(a) Vessels of the United States or vessels subject to jurisdiction of the United States.

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(j) Attempt or conspiracy

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

46 U.S.C.A.App. § 1903(a), (j) (1989).

20. We have some cautionary words for two of the counsel appearing in this appeal.

Both in its brief and at oral argument, the government failed to argue that the statement made by Roberto Mieres-Borges provided sufficient evidence to sustain his conviction. When asked specifically at oral argument whether it could present any evidence which would link either of the appellants to the cocaine, beyond that which was presented against Osvaldo Becerra-Flores, the United States Attorney stated that no such evidence existed. A simple reading of the record of the proceedings in the district court would have revealed that the trial was bifurcated and that additional evidence was presented against Mieres-Borges. While we recognize the heavy case load under which the United States Attorney labors, we wish to emphasize the importance of the record to every case, and particularly to cases involving the sufficiency of evidence.

We also note that counsel for Appellant Mieres-Borges adopted the argument of counsel for Appellant Becerra-Flores on the sufficiency of evidence issue. While Rule 28(i) of the Federal Rules of Appellate Procedure certainly allows counsel for one appellant to rely on the argument of counsel for another appellant, this procedure should not be employed for the purpose of deceiving the appellate court. Counsel for Mieres-Borges defended Mieres-Borges at trial in the district court, and so was well aware of the statement made by the appellant which constituted additional evidence against him. Yet nowhere in the brief, whether in its statement of procedural or factual history or in its legal argument, and at no time during oral argument, was this evidence mentioned. This was made possible largely because, in light of the adoption of argument under Rule 28(i), counsel for Mieres-Borges focused only on the sentencing issue in his brief and at oral argument. We caution counsel for Mieres-Borges to be more forthright in his presentation of facts and in his argument before this court in the future.

Applicat. .. of United States Sentencing Guidelines

[12] Appellant Mieres-Borges challenges the district court's determination of his base offense level under the United States Sentencing Guidelines. Mieres-Borges first maintains that the district court erred in allowing the government to establish the weight of the cocaine for sentencing purposes under a preponderance of the evidence standard. Mieres-Borges asserts that instead, evidence beyond a reasonable doubt was necessary in order to impose sentence for possession of a particular amount of cocaine. We disagree.

The district court found, based upon the weight of the cocaine as established at trial, that Mieres-Borges should be sentenced under a base offense level of 36.[21] The appellant argues that a base offense level of 32 was mandated[22] because the government failed to establish the weight of the cocaine necessary for application of the higher level. Because we find that the district court need only have applied a preponderance of the evidence standard in determining the weight of the cocaine, we reject appellant's reasoning.

[13] "The Supreme Court has held that the prosecution need not ' "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." ' *United States v. Cross*, 916 F.2d 622, 623 (11th Cir.1990) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 84, 106 S.Ct. 2411, 2415, 91 L.Ed.2d 67 (1986) (citations omitted)). "In determining which facts must be proven beyond a reasonable doubt, the legislature's definition of the elements of an offense controls." *United States v. Cross*, 916 F.2d at 623; *McMillan v. Pennsylvania*, 477 U.S. at 85, 106 S.Ct. at 2415–16. "Thus, the prosecution is only required to prove beyond a reasonable doubt 'all of the elements *included in the definition of the offense* of which the defendant is charged.' " *United States v. Cross*, 916 F.2d at 623 (quoting *McMillan v. Pennsylvania*, 477 U.S. at 84, 106 S.Ct. at 2415, (citation omitted) (emphasis added in *McMillan*). District courts are required by due process to make factual determinations at sentencing only by a preponderance of the evidence. *United States v. Ignacio Munio*, 909 F.2d 436, 439 (11th Cir.1990); *United States v. Alston*, 895 F.2d 1362, 1372–73 (11th Cir.1990).

Again, the statute under which Mieres-Borges was convicted does not include weight or quantity as an element of the offense. Therefore, the district court was only required to determine the weight of the cocaine by a preponderance of the evidence for purposes of sentencing. The district court judge found that the weight of the cocaine as established at trial was over three times that required for application of a base offense level of 36.[23] This weight was established through the testimony of a Drug Enforcement Administration agent, who testified that he lifted six or seven of the eleven bales and found them to weigh at least five kilograms each. In addition, evidence of a logbook entry from the drug storage warehouse listed the weight of the cocaine seized as 605 pounds, or 275 kilograms. We believe that this evidence was sufficient to establish, by a preponderance of the evidence, the weight of the cocaine. Accordingly, we AFFIRM the district court's application of a base offense level of 36 to Roberto Mieres-Borges.

[14] Finally, Mieres-Borges challenges the refusal of the district court to allow a two level reduction in his base offense level based on his minor role in the offense. We have held that a district court's determina-

21. That level is applied where a defendant is convicted with respect to at least 50 kilograms but less than 150 kilograms of cocaine. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1(c)(4) (Nov.1989).

22. That level is applied where a defendant is convicted with respect to at least 5 kilograms but less than 15 kilograms of cocaine. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1(c)(6) (Nov.1989).

23. The judge found that it was established at trial that there were 275 kilograms of cocaine on the beach at Cay Sal.

tion of a defendant's role in an offense is a finding of fact to which the clearly erroneous standard is applied. *United States v. Carrillo*, 888 F.2d 117, 118 (11th Cir.1989) (per curiam) (citations omitted). The district judge found no evidence that Mieres-Borges was any less culpable than his co-defendants. Because we do not find this conclusion to be clearly erroneous, we AFFIRM the district court's denial of a two point reduction in the base offense level of Roberto Mieres-Borges, under section 3B1.2 of the Sentencing Guidelines.

Conclusion

For the above reasons, we hereby REVERSE the conviction of Appellant Osvaldo Becerra-Flores on both counts. We SUSTAIN the conviction of Appellant Roberto Mieres-Borges on both counts and AFFIRM the district court's application of the United States Sentencing Guidelines to Mieres-Borges.

JOHNSON, Circuit Judge, dissenting:

I dissent. Though I agree with the majority that the evidence was insufficient to justify convicting defendant Becerra-Flores, I cannot agree that the addition of Mieres-Borges' post-arrest exculpatory statement tips the scales so far in favor of conviction that we can conclude that the jury could reasonably find Mieres-Borges guilty beyond a reasonable doubt.

"Reasonable doubt" is defined "in terms of the kind of doubt that would make a person hesitate to act." *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99 L.Ed. 150 (1954). Our Circuit has defined the exacting standard of "beyond a reasonable doubt" as "proof of a 'convincing character' sufficient to justify reliance 'without hesitation' in the conduct of one's 'most important affairs.'" *United States v. Jones*, 663 F.2d 567, 571 (5th Cir. Unit B 1981) (quoting jury charge approved of in that case). The prosecution has the burden of proving "beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977). The crime of possession with intent to distribute with which Mieres-Borges was charged requires that the prosecution show, by proof of such convincing character that it justifies the jury's reliance upon it without hesitation, three essential elements: "(1) knowing (2) possession of a controlled substance (3) with intent to distribute it." *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983); *see also* 46 U.S.C.A.App. § 1903(a) (proof of violation of this statute, with which Mieres-Borges was specifically charged, also requires that the crime occur on board a vessel). To prove the crime of conspiracy, the government must prove by the same standard three more essential elements: (1) "an agreement existed between two or more people to commit a crime," (2) "the accused had knowledge of at least the essential objectives of that agreement," and (3) "armed with that knowledge, he voluntarily joined or participated in the illegal venture." *United States v. Pantoja-Soto*, 739 F.2d 1520, 1525 (11th Cir.1984), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985).

Our standard for reviewing the sufficiency of the evidence requires us to reverse the conviction if "there is a lack of substantial evidence ... from which a reasonable factfinder could find guilt [without hesitation]." *United States v. Kelly*, 888 F.2d 732, 740 (11th Cir.1989). While the factfinder need not exclude every reasonable hypothesis of innocence, the evidence must be declared insufficient "where such evidence is wholly consistent with an obvious and reasonable innocent interpretation." *Id.* Rather than demonstrating guilt, Mieres-Borges' exculpatory statement more sensibly implicates an innocent explanation of what the defendants were doing in proximity to the cocaine. The defendants were in the area; an unfamiliar plane flew overhead dropping packages; they fished them out of the water and examined them; they decided to get rid of them by stacking them on the beach.

Mieres-Borges' explanation goes a long way toward explaining some of the peculiarities of this case. First, on the evening of November 7th the customs pilot observed the smugglers' plane drop at least twenty bales, but only eleven were found on the beach. If the defendants picked up some of these bales out of curiosity, it would make sense that once they realized that the bales contained contraband and began to appreciate the consequences of their possession of the bales they would not pursue the remaining ones. Second, there was testimony at trial by the agents that, in the twelve hours between the sighting of the boat on the evening of November 7th and the sighting the next morning, the defendants' boat could have traveled hundreds of miles. But the pilot spotted the boat on the morning of the 8th only 30 miles from the drop site. If the defendants were the smugglers, it makes no sense that they would stay in the area of the drop site, waiting for law enforcement officers to discover them. Though they may not have known that they had been observed on the evening of the 7th, it still is not typical criminal behavior to dally at the scene of the crime for twelve hours. Third, it remains unclear why the defendants, if they were actually the smugglers, would have left the cocaine in plain view on the beach, totally unprotected. Though Cay Sal Bank is an undeveloped island, there was testimony that it is a popular fishing and diving spot. It seems that the true smugglers would be very interested in protecting and concealing their investment. But the Coast Guard did not even find a weapon on board the defendants' boat. Fourth, though the agent testified that Mieres-Borges told him in his post-arrest statement that the defendants had examined the packages, there was no evidence that the defendants ever opened any of the packages. On cross-examination the agent clarified that Mieres-Borges had merely stated that they had examined the packages and then decided to put them on the beach. Mieres-Borges apparently did not say that he opened any of the packages. The government did not show that any of the bales found on the beach had been opened. Moreover, there was testimony that the Coast Guard did not find even any residue of cocaine on the boat in spite of an extensive search. If the defendants had opened a package, as drug dealers normally would for testing upon receipt of a delivery, then there surely would have been some residue to be found somewhere on board. In sum, the most reasonable conclusion in this case is that the defendants were not the intended recipients of the dropped bales.

The government did not meet its burden in presenting evidence on each element of the charges which would allow a jury to convict beyond a reasonable doubt or "without hesitation." The exculpatory statement did in fact link Mieres-Borges to the cocaine, as the majority points out, thus showing he had been in possession of it. But the government never put on any direct evidence showing intent to distribute. The crime of possession with intent to distribute may be proven through circumstantial evidence. *Vera*, 701 F.2d at 1357. But here, where there is a reasonable and innocent explanation of the circumstances, to infer intent is simply too long a leap. This is a leap which surely cannot be made "without hesitation." Likewise, the evidence of a conspiracy was totally circumstantial. Though proof of conspiracy by circumstantial evidence is also permissible under *Vera*, and many other cases, it is a long leap to conclude that there existed an agreement between the three defendants and that Mieres-Borges knew the essential objectives of the conspiracy. In sum, Mieres-Borges' exculpatory statement seems to make at least as much sense out of the evidence as the conclusion that the defendants were smuggling drugs. The standard of "beyond a reasonable doubt" is an exacting one. I cannot say that a jury could find "without hesitation" that the government has proven each of the elements of these crimes. I therefore would hold the evidence against Mieres-Borges to be insufficient. Consequently, I would not reach the sentencing issue.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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SUPREME COURT, U.S.

JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed an appeal by a convicted defendant who fled following his conviction and was recaptured and returned to custody 11 months later.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-7749

JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The orders of the court of appeals dismissing petitioner's appeal (Pet. App. I) and denying petitioner's motion to reinstate the appeal (Pet. App. II) are unreported.

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal (Pet. App. I) was entered on July 19, 1991, and the order denying petitioner's motion to reinstate the appeal (Pet. App. II) was entered on January 22, 1992.[1] The petition for a writ of

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[1] Although petitioner's motion to reinstate his appeal was not denominated a petition for rehearing, it was styled in the alternative as a motion "for reconsideration of order granting

(continued...)

certiorari was filed on March 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession, on board a vessel of the United States, of cocaine with intent to distribute it, in violation of 46 U.S.C. 1903(a); and conspiracy to commit that offense, in violation of 46 U.S.C. 1903(j). Petitioner fled before sentencing and was sentenced in absentia. He was recaptured 11 months later and was resentenced to 188 months' imprisonment, to be followed by five years of supervised release. The court of appeals dismissed petitioner's appeal. Pet. App. I.

1. The evidence at trial showed that, on November 7, 1988, the Customs Service received reports of a possible air drop of narcotics in the Cay Sal Bank area of the Bahamas, which is located south of the Florida Keys. At dusk that evening, a Customs aircraft in that area observed another plane circling a boat at a low altitude and dropping 20 bales into the water, which were picked up by the boat. When the plane left the area, the Customs pilot followed it to Cuban airspace before abandoning pursuit. The

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[1](...continued)
appellee's motion to dismiss," and it was based on Rule 40 of the Federal Rules of Appellate Procedure. We therefore believe that, for jurisdictional purposes, petitioner's motion to reinstate his appeal should be regarded as a petition for rehearing pursuant to Fed. R. App. P. 40 and that his petition is therefore timely.

Customs pilot was unable to relocate the boat when he returned to the area of the air drop 40 minutes later. Pet. App. III, at 654.

Early the next morning, a second Customs aircraft searched for the boat. It spotted a boat that appeared to fit the first pilot's description -- the Wilfred from Miami, Florida -- at anchor off the south beach of Cay Sal Island. The pilot then flew over the site where the air drop had been observed the night before, but he did not see any bales or other vessels. When he returned ten minutes later, the pilot saw the Wilfred traveling away from the island toward Cuba. He noticed a brown burlap cover over the back of the boat that hid its name. When he flew over the island, the pilot saw numerous bales wrapped in white plastic and stacked above the high water mark on the beach. He also observed footprints between the stacked bales and the beach area where the Wilfred had been sighted earlier. Pet. App. III, at 655.

The Customs pilot asked the Coast Guard to intercept the Wilfred. Shortly thereafter, the Coast Guard contacted the Wilfred by radio and asked a series of standard pre-boarding questions. After responding three times that the Wilfred's last port of call was Cayo Blanco, the captain of the Wilfred changed his answer and stated that he had departed from Key Largo, Florida. The captain also responded that the Wilfred was headed back to Key Largo and that the purpose of the voyage had been fishing. Pet. App. III, at 655-656. The Coast Guard then boarded the Wilfred, but the boarding party did not find any contraband. Petitioner and two co-defendants, Roberto Mieres-Borges and Osvaldo Becerra-Flores, who

were on board, were arrested. Bahamian law enforcement agents later recovered 11 bales containing cocaine from the beach site on Cay Sal Island. Id. at 656.

2. After being convicted by a jury, petitioner failed to appear for sentencing on June 15, 1989. He was sentenced in absentia to 235 months' imprisonment, to be followed by five years of supervised release. A week later, the district court issued a warrant for petitioner's arrest. Petitioner was arrested 11 months later and remanded to custody. The district court subsequently granted petitioner's motion to vacate his sentence and for resentencing. See Gov't Motion to Dismiss Appeal ii-iii.

While petitioner was a fugitive, his two co-defendants appealed their convictions. On December 18, 1990, the court of appeals ruled that the evidence at trial was insufficient to sustain Becerra-Flores' conviction, but it affirmed Mieres-Borges' conviction.[1] Pet. App. III, at 652-664. Based on the court of appeals' decision, petitioner moved for a judgment of acquittal. On January 11, 1991, the district court denied the motion and resentenced petitioner to 188 months' imprisonment, to be followed by five years of supervised release. On June 21, 1990, petitioner was convicted of contempt of court, in violation of 18 U.S.C. 401(3), and failure to appear for his original sentencing, in violation of 18 U.S.C. 3146. On April 15, 1991, petitioner was

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[1] The court of appeals' ruling that the evidence was sufficient to sustain Mieres-Borges' conviction was based primarily on an inculpatory statement given by Mieres-Borges to a Customs Service agent after his arrest. Pet. App. III, at 660-661.

sentenced to 21 months' imprisonment on those charges; that sentence was made consecutive to his 188-month sentence. See Gov't Motion to Dismiss Appeal iii.

3. Following his resentencing on the narcotics offenses, petitioner appealed. Relying on United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), and United States v. London, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228 (1984), the government moved to dismiss the appeal on the ground that petitioner had waived his right to appeal the narcotics conviction when he fled after conviction and before sentencing. On July 19, 1991, the court of appeals entered an order granting the motion to dismiss the appeal. Pet. App. I. The court subsequently denied petitioner's motion to reinstate that appeal. Pet. App. II.

ARGUMENT

1. The court of appeals' decision in this case conflicts with the First Circuit's decision in United States v. Anagnos, 853 F.2d 1 (1st Cir. 1988). Also in disagreement with the First Circuit's Anagnos decision are decisions of the Second Circuit, in United States v. Persico, 853 F.2d 134, 136-138 (2d Cir. 1988), the District of Columbia Circuit, in United States v. Parrish, 887 F.2d 1107, 1109 (D.C. Cir. 1989), and the Fifth Circuit in United States v. DeValle, 894 F.2d 133 (5th Cir. 1990). We agree with petitioner that review by this Court is appropriate to resolve the disagreement among the circuits over their authority to dismiss appeals of defendants who flee after conviction and are later recaptured.

The Eleventh Circuit in this case followed its prior decision in United States v. Holmes, 680 F.2d at 1373, in which the court held that "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." See also United States v. London, 723 F.2d 1538, 1539 (11th Cir.) (court should dismiss appeal of recaptured defendant who fled during trial and was convicted in absentia), cert. denied, 467 U.S. 1228 (1984). In contrast, in United States v. Anagnos, 853 F.2d at 2, the First Circuit held that it was improper to dismiss the appeal of a recaptured defendant who fled after the verdict but was subsequently recaptured and sentenced. The court explained that "Anagnos' misconduct was in the district court, and should affect consequences in that court, not ours." The court in Anagnos went on to consider the merits of the recaptured defendant's appeal. Id. at 2-5.

The Second Circuit, in United States v. Persico, supra, refused to consider the defendant's claims of trial error, holding that it could decline to reach those issues in light of the defendant's flight before sentencing. The court identified three considerations supporting dismissal of the defendant's appeal, even when the defendant has been recaptured prior to sentencing: (1) the defendant has "flout[ed] the judicial process by escaping"; (2) a rule of dismissal "has the salutary effects of discouraging escape and promoting the efficient operation of appellate courts"; and (3) "the delay occasioned by the period of a defendant's flight can

prejudice the prosecution should a new trial be ordered after a successful appeal." 853 F.2d at 137.[y]

In United States v. Parrish, supra, the District of Columbia Circuit likewise dismissed the appeal of a defendant who fled before sentencing and was at large for 14 years. The court did not decide whether a defendant who becomes a fugitive after conviction and files an appeal after being returned to custody "inevitably waives his statutory right to appeal the conviction regardless of the length or the circumstances of his flight." Nonetheless, the court rejected the analysis of the First Circuit in Anagnos and found "the reasoning of the Second and Eleventh Circuits more persuasive." 887 F.2d at 1108. The court noted that a defendant who becomes a fugitive "disdains the entire judicial system, not just the particular court his case has reached at the time he flees. Furthermore, he disrupts 'the orderly operation of the judicial processes within which defendants should press their claims.'" Ibid., quoting United States v. Persico, 853 F.2d at 138. Accordingly, the court dismissed the defendant's appeal in that case.

Finally, the Fifth Circuit in United States v. DeValle, supra, dismissed the defendant's appeal from her conviction when she fled before sentencing and was captured eight months later. The court declined to follow the First Circuit's decision in Anagnos, and instead followed Parrish, Persico, Holmes, and London, all of which

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[y] The Ninth Circuit, in Katz v. United States, 920 F.2d 610, 612-613 (1990), rejected the Second Circuit's analysis in Persico, although in a somewhat different setting.

held that a court of appeals has authority to dismiss a defendant's appeal from his conviction when the defendant has fled before sentencing and is subsequently recaptured. Following those decisions, the court held that "recapture prior to dismissal of the appeal (and indeed prior to the filing of a motion to dismiss the appeal) does not deprive the appellate court of authority to dismiss the appeal, at least as to trial proceedings completed before the appellant became a fugitive." 894 F.2d at 136.

2. The general principles applicable to flight by defendants after conviction are well settled. This Court and the courts of appeals have authority to dismiss the appeal of a criminal defendant who escapes from custody and remains a fugitive during the pendency of his appeal. In Molinaro v. New Jersey, 396 U.S. 365, 366 (1970), the Court explained that no persuasive reason exists to adjudicate the merits of such an appeal and that an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims." See also Eisler v. United States, 338 U.S. 189 (1949); Bonahan v. Nebraska, 125 U.S. 692 (1887); Smith v. United States, 94 U.S. 97 (1876); Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam) (noting that "[d]isposition by dismissal of pending appeals of escaped prisoners is a long-standing and established principle of American law").

This Court has not resolved the question whether the same rule should apply to a defendant who is recaptured before his appeal is dismissed. The Court, however, has upheld state court orders declining to review convictions of escaped criminal defendants even

when the defendant is no longer at large. In Allen v. Georgia, 166 U.S. 138, 142 (1897), the Court upheld the state court's dismissal of an appeal of an escaped prisoner and its refusal to reinstate the appeal upon his recapture. And in Estelle v. Dorrough, supra, the Court upheld a state court decision dismissing the appeal of a defendant who escaped after appealing and was recaptured two days later. The Court noted that the Texas statute requiring that disposition served ends similar to this Court's decisions upholding dismissal of appeals while the defendant remains a fugitive: "It discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the [appellate court]." 420 U.S. at 537 (footnote omitted).

This case presents the question whether the same rule should apply in federal criminal proceedings, and it presents that question in the context of escapes occurring after conviction but before sentencing. Because the courts of appeals are divided on that question, and because the question arises with sufficient frequency to justify this Court's review, we do not oppose the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER	)	
V	)	NO. 91-7749
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by mail on May 26, 1992.

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May 26, 1992

SUPREME COURT, U.S.
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No. 91-7749

In The

Supreme Court of the United States

October Term, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 17, 1992
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June 21, 1990 – Mr. Ortega's indictment for contempt of court for failure to appear for sentencing in *United States v. Jose Antonio Ortega-Rodriguez*, Case No. 88-10035-Cr-KING, and for failure to appear at sentencing.

January 9, 1991 – Mr. Ortega's Motion for Judgment of Acquittal.

January 11, 1991 – Judgment and Sentence of Mr. Ortega.

January 28, 1991 – Mr. Ortega's Notice of Appeal.

April 12, 1991 – Mr. Ortega's Judgment and Sentence Order for Contempt of Court and Failure to Appear.

May 15, 1991 – Government's motion to dismiss Mr. Ortega's appeal.

May 21, 1991 – Mr. Ortega's response to government's motion to dismiss his appeal.

July 19, 1991 – Order of the United States Court of Appeals for the Eleventh Circuit which grants the government's motion to dismiss Mr. Ortega's appeal.

August 9, 1991 – Mr. Ortega's Motion to Reinstate Appeal.

August 23, 1991 – Government's response to Mr. Ortega's motion to reinstate appeal.

September 20, 1991 – Mr. Ortega's reply to government's response to his motion to reinstate appeal.

January 22, 1992 – Order of United States Court of Appeals for the Eleventh Circuit denying Mr. Ortega's Motion to reinstate appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-10035-Cr-JUDGE KING

UNITED STATES OF AMERICA :

v. :

JOSE ORTEGA-RODRIGUEZ :

MOTION TO VACATE SENTENCE AND
FOR RESENTENCING
(Dated JUN 7, 1980)

The Defendant Jose Ortega-Rodriguez, through counsel and pursuant to Rules 32 and 43 of the Federal Rules of Criminal Procedure, respectfully moves that the sentence previously imposed in the above-styled cause on June 22, 1989 be vacated and that Defendant be resentenced, and as grounds therefor says:

1. Defendant, along with two co-defendants, was charged in a two count indictment with possession with intent to distribute in excess of five kilograms of cocaine on a United States registered vessel and with conspiracy to commit the aforesaid act in violation of Title 46, United States Code, Sections 1903(a) and (j) respectively.

2. On March 20, 1989, all of the defendants proceeded to trial. They were all found guilty after trial by jury on March 24, 1989.

3. At the time that the adverse verdict was returned in Key West, Florida, this Court announced that sentencing would take place in Miami; however, a date was not available at that time and defendants were notified that they would receive notice once a sentencing date was scheduled.

4. Defendant did not appear before this Court on the referenced sentencing date. At that time, this Court elected to sentence Defendant *in absentia* to a period of incarceration of 235 months on each of counts I and II to be served concurrently. In addition, a five year term of supervised release was imposed as to count I and Defendant was assessed the sum of $100. The referenced sentencing proceeding took place over defense objection due to the absence of Defendant and his inability to address the Court on his own behalf.

Rule 43(a) of the Federal Rules of Criminal Procedure provides in applicable part:

> The Defendant shall be present . . . at the imposition of sentence, except as otherwise provided by this Rule.

See also United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980), *citing Caille v. United States*, 487 F.2d 614 (5th Cir. 1973).

As additional authority, Defendant turns to Rule 32 of the Federal Rules of Criminal Procedure. This Rule provides in applicable part:

> . . . Before imposing sentence, the court shall also –

> (A) determine that the defendant and his counsel have had the opportunity to read and discuss the pre-sentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B) . . .
>
> (C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

Finally, Rule 32(a)(2) provides that the defendant shall be informed as to his appellate rights by the sentencing court.

In the instant case, Defendant was never addressed personally by this Court as to whether he had the opportunity to review his pre-sentence investigation report and to discuss same with counsel. Similarly, Defendant did not have the opportunity to address the Court on his own behalf and/or to provide mitigation as to why he should have received a lesser sentence. Moreover, Defendant was never informed personally of his right to appeal his conviction, apparently contrary to the provisions of Rule 32.

Defendant respectfully requests that the sentence imposed in the above-styled case on June 22, 1989 be vacated and that this matter be reset for sentencing before this Court. In this manner, Defendant will receive the opportunity to personally address the Court and offer mitigation as to the sentence imposed. In addition, the requirements of Rules 32 and 43 could be fulfilled and Defendant would then be in a position to pursue the remainder of his legal remedies.

5. Odilio Diaz, the Assistant United States Attorney who is handling this matter for the government, does hereby oppose the relief sought herein.

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(Certificate Omitted In Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 90-0398 CR-KING
18 U.S.C. § 401(3)
18 U.S.C. § 3146

(Caption Omitted In Printing)

MAGISTRATE JOHNSON

INDICTMENT

The Grand Jury charges that:

COUNT I

On or about June 15, 1989, at Miami, Dade County, in the Southern District of Florida, the defendant,

JOSE ANTONIO ORTEGA-RODRIGUEZ,

knowingly and willfully, and in disobedience to and resistance to a lawful order and command of the United States District Court for the Southern District of Florida, given at Miami, Florida, on or about April 24, 1989, in *United States v. Jose Antonio Ortega-Rodriguez*, Case No. 88-10035-Cr-KING, did fail to appear for sentencing as ordered by the Court; in violation of Title 18, United States Code, Section 401(3).

COUNT II

On or about June 15, 1989, at Miami, Dade County, in the Southern District of Florida, the defendant,

JOSE ANTONIO ORTEGA-RODRIGUEZ,

having previously been convicted of violations of Title 46, United States Code, Sections 1903(a), (g) and (j), that is,

while aboard a vessel of the United States, possession with intent to distribute and conspiracy to possess with intent to distribute in excess of five (5) kilograms of cocaine, a Schedule II narcotic controlled substance, offenses punishable by imprisonment for a term of fifteen (15) years or more, and having been released by the United States District Court for the Southern District of Florida pursuant to Chapter 207 of Title 18, United States Code, Section 3141 *et seq.*, in *United States v. Jose Antonio Ortega-Rodriguez*, Case No. 88-10035-Cr-KING, did knowingly fail to appear before said Court as required by the conditions of his release, in that the defendant failed to appear for sentencing as ordered on April 24, 1989 by said Court; in violation of Title 18, United States Code, Section 3146.

A TRUE BILL
/s/ Illegible
FOREPERSON

/s/ Dexter W. Lehtinen (initials illegible)
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. ___

(Caption Omitted In Printing)

ESTIMATED TRIAL TIME

CERTIFICATE OF TRIAL ATTORNEY

I do hereby certify:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of

probable witnesses and the legal complexities of the indictment/information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. This case will take 2 days for the parties to try.

4. (Check the appropriate category)

X	I	0 to 5 days
	II	6 to 10 days
	III	11 to 20 days
	IV	21 to 60 days
	V	61 days and over

5. Has this case been previously filed in this Court?
NO*** (Yes or No)

If yes, Judge: _____ (Attach copy of
Case No: _____ dispositive order)

6. This case orginated in the U.S. Attorney's office *prior* to August 16, 1985 _____ (Yes or No)

/s/ Odilio M. Diaz
ODILIO M. DIAZ
ASSISTANT UNITED STATES ATTORNEY

*** This is a matter arising out of Case No. 88-10035-Cr-KING and pending before Judge KING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-10035-Cr-KING
(Florida Bar No. 371076)

(Caption Omitted In Printing)

ORDER ON DEFENDANT'S MOTION TO VACATE SENTENCE AND FOR RESENTENCING

This cause is before the Court on Defendant's Motion to Vacate Sentence and for Resentencing. Pursuant to a hearing conducted before this Court on October 11, 1990, it is

ORDERED that the mentioned motion is hereby GRANTED. The sentence previously imposed in the above-styled cause on June 22, 1989, is hereby VACATED. It is further ordered that this matter is hereby set for resentencing before this Court on Wednesday, December 19, 1990, at 1:30 p.m.

DONE and ORDERED at Miami, Florida, this 12 day of October, 1990.

JAMES LAWRENCE KING
JAMES LAWRENCE KING,
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-10035-Cr-KING

(Caption Omitted In Printing)

MOTION FOR JUDGMENT OF ACQUITTAL

Defendant Jose Antonio Ortega-Rodriguez, through counsel and pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, respectfully moves for a judgment of acquittal in regard to the above-styled cause, and as grounds therefor says:

1. Defendant, along with two co-defendants, was charged in a two count indictment with having possessed with intent to distribute in excess of five kilograms of cocaine while on board a vessel of the United States, and with conspiracy to commit the aforesaid act, in violation of Title 46, United States Code Appendix, Sections 1903(a) and (j) respectively.

2. On March 20, 1989, all defendants proceeded to trial before the District Court in Key West, Florida. The trial proceedings were bifurcated in that there was a statement attributable to co-defendant Mieres-Borges and no statements were made by either Defendant or the remaining co-defendant Becerra-Flores. Accordingly, in order to avoid *Bruton*[1] problems the jury heard all of the evidence without Mieres' statement and then heard closing argument on behalf of Becerra and Defendant. The jury then deliberated and returned sealed verdicts as to

[1] *Bruton v. United States*, 391 U.S. 123 (1968).

Defendant and Becerra. The government then presented its evidence in regard to the statement attributable to Mieres. Closing argument ensued and the jury returned its verdict.

3. On March 24, 1989, all defendants were convicted on all counts.

4. On June 15, 1989, all defendants were sentenced by this Court. Defendant, who did not appear on the specified date, was sentenced in absentia. All defendants received the identical sentence of two hundred thirty-five months.

5. On June 7, 1990, Defendant filed his Motion to Vacate Sentence and for Resentencing. Pursuant to a hearing held before this Court on October 11, 1990, Defendant's motion was granted. A written order was entered by this Court on October 12, 1990. Defendant's resentencing is now scheduled before this Court on January 11, 1991.

6. The co-defendants proceeded with their appeals after sentencing. On December 18, 1990, the Court of Appeals entered a written, published order with an opinion by which the convictions as to co-defendant Becerra-Flores were reversed.[2] Co-defendant Becerra-Flores is situated identically to Defendant in regard to the case before this Court.

7. In *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990)[3], [1990 U.S. Ap. LEXIS 21715] the

[2] The convictions as to co-defendant Mieres-Borges were affirmed.

[3] A copy of the referenced opinion is attached hereto as Exhibit "A".

Appellate Court found as a matter of law that the evidence presented at trial was insufficient to establish the guilt of Becerra beyond a reasonable doubt and reversed his conviction as to both counts. *Id.* at p. 2.[4] As to the conspiracy count, the Appellate Court stated:

> "From the evidence presented at trial against Becerra-Flores, however, we are not convinced that the government met its burden by establishing the existence of a conspiratorial agreement beyond a reasonable doubt. No evidence showed that Becerra-Flores ever entered into an agreement with any other defendant to distribute cocaine. Furthermore, Becerra-Flores was not shown to have committed any acts which would further such a conspiracy." *Id.* at 8.

8. As to the substantive count, the Appellate Court continued:

> "Similarly, we believe that the government failed to establish, by and through the evidence presented against Becerra-Flores, that he did in fact possess cocaine with the intent to distribute. Becerra-Flores was never shown to be in actual possession of any of the bails [sic] of cocaine discovered on the beach at Cay Sal. Constructive possession was also never established by the government at trial. It is simply not clear beyond a reasonable doubt that Becerra-Flores had a knowing power or right to exercise dominion and control over the bails [sic] of cocaine. Becerra – Flores was never seen on the

[4] For ease of reference to the attached opinion from LEXIS, indicated page numbers refer to those on the upper right hand corner of the referenced exhibit.

beach but the bails [sic] of cocaine; **in fact, none of the Defendants aboard the Wilfred were seen with the cocaine.** No evidence was presented which showed that Becerra-Flores **or any other defendant** left the Wilfred and went ashore on Cay Sal. Further, **none of the defendants** was shown to evice [sic] any dominion or control over the beach on which the cocaine was found. There was no other evidence of any attempt to guard the beach or to prevent others from going ashore." *Id.* at 8. (emphasis supplied).

9. As to the appellate record in regard to the instant case, Defendant is situated identically to that of co-defendant Becerra-Flores. Identical evidence was presented by the government as to Defendant and Becerra, they gave closing argument at the same time and the jury returned its verdict as to Defendant and Becerra prior to its having entertained the statement against Mieres-Flores. Finally, there was no additional evidence presented solely against Defendant which would occasion a different result on appellate review. As the Court of Appeals further found:

> "Evidence presented at trial did not reveal which of the defendants was the captain of the Wilfred." *See p. 5, Footnote 9.*

MEMORANDUM OF LAW

The rules of criminal procedure do not demarcate the outer limits of a trial court's authority to vacate a judgment of conviction. Under its inherent supervisory power, a District Court may consider an untimely post-trial Motion for Judgment of Acquittal or may grant such a motion sua sponte to correct manifest error when it

retains jurisdiction over the case. *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989). See also *United States v. Coleman*, 811 F.2d 804, 806-07 (3rd Cir. 1987). The rules must be applied flexibly "to provide for the just determination" of every case and must be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." *DiBernardo, supra.*

Defendant's situation fits the *DiBernardo* criteria. Specifically, although a Motion for Judgment of Acquittal is untimely, it is a matter which appropriately can be addressed by this Court. Presently, jurisdiction lies with this Court as sentencing is scheduled for January 11, 1991. Although the rules of criminal procedure would seem to preclude the instant motion, the demands of simplicity in procedure and the other deliniated [sic] factors warrant that this Court exercise its supervisory powers at this time.

In light of the *Mieres* opinion which reversed all convictions and the fact that Defendant is situated identically to his former co-defendant in every factual respect on the record pertaining to that which ocurred [sic] at trial, Defendant respectfully requests that this Court exercise

its supervisory powers and grant his Motion for Judgment of Acquittal for the reasons cited herein.

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: /s/ Stewart G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
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(Certificate Of Service Omitted In Printing)

United States Court of Appeals,
Eleventh Circuit.

Dec. 18, 1990.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roberto MIERES-BORGES and
Osvaldo Becerra-Flores.
Defendants-Appellants.

No. 89-5643.

Appeals from the United States
District Court for the
Southern District of Florida

Before FAY and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

FAY, Circuit Judge:

Defendants-appellants Roberto Mieres-Borges and Osvaldo Becerra-Flores appeal their convictions in federal district court for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine and for possession with intent to distribute in excess of five kilograms of cocaine. Both appellants challenge the sufficiency of the evidence to support the jury verdicts against them. Because we find that the evidence presented at trial was insufficient to establish the guilt of Appellant Osvaldo Becerra-Flores beyond a reasonable doubt, we REVERSE his conviction on both counts. Because we find

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

that the evidence presented at trial would allow a reasonable factfinder to conclude that Appellant Roberto Mieres-Borges was guilty beyond a reasonable doubt, we SUSTAIN his conviction on both counts. In the alternative, Appellant Mieres-Borges challenges his conviction on the ground that the weight of the cocaine he possessed was not established at trial beyond a reasonable doubt. Because we find that the government was not required to establish the weight of the cocaine seized as an element of the offenses charged, we SUSTAIN his conviction on this ground as well. Finally, Appellant Mieres-Borges challenges the district court's determination of his base offense level under the United States Sentencing Guidelines. Mieres-Borges maintains that the district court erred in refusing to require proof of the weight of the cocaine beyond a reasonable doubt for purposes of sentencing, and that it erred in refusing to reduce his base offense level by two points for his minor role in the offense. For the reasons that follow, we AFFIRM the refusal of the district court to require proof of the weight of the cocaine possessed by Mieres-Borges beyond a reasonable doubt. In addition, we AFFIRM the district court's refusal to reduce the base offense level of Mieres-Borges under section 3B1.2 of the Sentencing Guidelines.

Procedural History

Appellants Roberto Mieres-Borges and Osvaldo Becerra-Flores were indicted by a federal grand jury as two counts. Count one charged appellants with possession with intent to distribute in excess of five kilograms of cocaine in violation of 46 U.S.C.App. §§ 1903(a) and 1903(g) and 18 U.S.C. § 2. Count two charged appellants

with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine in violation of 46 U.S.C.App. §§ 1903(j) and 1903(g). Appellants and a co-defendant[1] were convicted by a jury on both counts. At a bifurcated trial, the jury first returned a verdict against Becerra-Flores. This verdict was sealed while the government presented additional evidence of a statement made by Mieres-Borges to a criminal investigator for the United States Customs Service. Considering this statement in addition to the evidence already presented against Becerra-Flores, the jury then returned a verdict against Mieres-Borges. Both appellants are currently incarcerated.

Factual History

On the evening of November 7, 1988, a United States Customs Service sensor aircraft[2] was launched from Homestead Air Force Base in response to information that an air drop of narcotics was to take place in the Cay Sal Bank area.[3] While conducting a radar patrol of the area, the pilot, David Sherry, responded to a specific report of an aircraft going over Cuba and flying very low to the

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[1] The co-defendant fled the jurisdiction prior to sentencing and is not a party to this appeal.

[2] The sensor aircraft is equipped with a radar and a forward looking infrared camera for detecting drug traffickers both in the air and on the sea.

[3] The Cay Sal Bank area, and Cay Sal Island, are located midway between the Florida Keys and the island of Cuba.

ground. Arriving at an area just south of Cay Sal, at approximately twenty minutes before dusk, Sherry saw an aircraft circling over a vessel at a very low altitude and dropping bales. The boat was circling in the same manner as the plane and was picking up the bales as they were dropped. Sherry counted twenty bales that were dropped from the plane into the water.

Faced with the choice of whether to pursue the boat or the plane, Sherry followed the aircraft as it travelled west along Cuban airspace. Fearful of an encounter with a Cuban fighter plan, Sherry eventually abandoned his pursuit and returned to the Cay Sal Bank area to look for the vessel. When he returned after 40 minutes, the vessel could not be relocated.

Sherry described the boat as white, 40 to 50 feet in length, with tuna towers and a number of antennas. He admitted at trial, however, that there were numerous boats in the area of southern Florida to the Bahamas matching that description. Further, the evidence at trial showed that the Customs plane was flying at an altitude of 2500 feet[4] and that visibility was not optimal. For these reasons, Sherry was unable to ascertain the name of the vessel.

A second Customs plane was launched to search for the boat at six a.m. the following morning, approximately twelve hours after Sherry first spotted the vessel. When

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[4] The Customs pilot testified that he did not want to fly so low as to be detected by the boat below and thereby risk destruction of any contraband the boat may have been carrying.

he arrived at Cay Sal, the pilot, William Radtke, saw only one boat which resembled the vessel described by Sherry. Radtke described the boat as a 30 to 40 foot sportfishing vessel with a tuna tower, sitting approximately ten feet off of the south beach of Cay Sal. The name of the boat was the "Wilfred" from Miami, Florida.

Radtke left the boat to go to the drop point from the night before and returned to Cay Sal when he didn't see any bales or any other vessels. As he approached Cay Sal, he noticed the Wilfred was underway and heading away from the island with a cover[5] over the back of the transom hiding the name of the boat. The boat was headed toward Cuba, travelling at 30 knots.[6] Radtke then flew over Cay Sal and saw numerous rectangular bales wrapped in white plastic and stacked on the high water mark of the beach.[7] He described a set of roundtrip like footprints leading from the water to where the bales were stacked and back to the water again. The footprints leading to and from the water were in the area where the Wilfred was originally sighted by Radtke.

Radtke admitted at trial that there was a discrepancy between the size of the Wilfred, which he described as 30

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[5] Radtke described the cover as a brown burlap cover or brown rug thrown over the back of the transom.

[6] Thirty knots is the approximate equivalent of thirty-five to thirty-six miles per hour.

[7] Radtke testified that he didn't see the bales on the beach when he made his first sweep over Cay Sal Island. He emphasized, however, that he wasn't at that time looking for anything but the boat spotted the evening before.

to 40 feet in length, and the size of the vessel spotted by Sherry the evening before, which was described as 40 to 50 feet in length. Although Radtke testified that he saw no other boats within a 30-mile radius of the Cay Sal beach where the Wilfred was spotted, he stated that he was conducting only a visual search of the area without the benefit of radar. In addition, Radtke admitted that a boat like the Wilfred could have travelled[sic] 360 miles in the twelve hours between the time that the unidentified boat was spotted by Sherry picking up bales, and the time that the Wilfred was first identified off of Cay Sal. Radtke never saw any contraband aboard the Wilfred.

Radtke radioed Chief Quartermaster Rafael Lewis, of the United States Coat Guard, to intercept the Wilfred. Lewis spotted the Wilfred between nine and nine-thirty a.m. heading toward Cuban territorial waters at a speed of ten to fifteen knots.[8] Lewis contacted the Wilfred by radio and asked a series of standard pre-boarding questions. Lewis first asked what was the Wilfred's latest port of call. The captain of the Wilfred[9] responded three times that they had been at Cayo Blanco.[10] The fourth time[11]

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[8] Ten to fifteen knots is the approximate equivalent of thirteen to eighteen miles per hour.

[9] Evidence presented at trial did not reveal which of the defendants was the captain of the Wilfred.

[10] Cayo Blanco is in Cuban territorial waters.

[11] Lewis testified that he found it unusual for a United States vessel to be inside Cuban territorial waters. For this reason he asked the captain of the Wilfred three times to repeat his answer.

the Captain changed his answer and stated that he had departed Key Largo, Florida. When Lewis asked what the Wilfred's next port of call was, the captain stated that they were headed back to Key Largo. Finally, when Lewis inquired as to the purpose of the Wilfred's voyage, the captain responded that they were fishing. The Coast Guard then boarded the Wilfred to check documentation and compliance with safety regulations. Lewis testified that when asked to point to a position on the nautical chart where he had been fishing, the captain was very vague and didn't pinpoint any particular position. In addition, the captain of the Wilfred kept no nautical log on board that indicated where the Wilfred had been.[12]

A three to four hour inspection of the Wilfred revealed no contraband aboard the vessel. The Wilfred had fishing equipment on board, although the equipment was not rigged. The boat's outriggers were also not rigged. While there were no freshly caught fish on board, there was ice in the fishing box, as well as two unopened containers of bait. There was scuba gear on board, and there were fishing rigs out on deck, which were not baited. A temporary fishing license was found on the vessel, which allowed the Wilfred to fish in American Waters.[13] The Wilfred's captain stated that they were fishing for dolphin.[14]

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[12] Lewis admitted on cross-examination that not all small boats keep such logs.

[13] The license did not allow the Wilfred to fish in Cay Sal or in Cuban waters. When asked if he had been fishing in the Cay Sal Island area, the captain stated that he had not.

[14] The Coast Guard officer acknowledged that because dolphin are migratory, it is impossible to anticipate where they will be before going out to fish for them.

Sufficiency of the evidence

Whether there was sufficient evidence to support a conviction is a question of law subject to de novo review by this Court. Thus, we owe no special deference to findings of the district court. *United States v. Kelly*, 888 F.2d 732-739-40 (11th Cir.1989) (citing *United States v. Pareja*, 876 F.2d 1567, 1568 (11th Cir.1989)). In reviewing the sufficiency of the evidence to support a jury verdict, we must view the evidence in the light most favorable to the government. *United States v. Chotas*, 913 F.2d 897, 898 (11th Cir.1990) (per curiam) (citations omitted). Thus, all reasonable inferences and credibility choices are made in the government's favor. *United States v. Kelly*, 888 F.2d at 740 (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Gregory*, 730 F.2d 692, 700 (11th Cir.1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985)).

Accepting all reasonable inferences which support the verdict, we will affirm the conviction " 'if a reasonable trier of fact could conclude that the evidence establishes guilt beyond a reasonable doubt.' " *United States v. Pritchett*, 908 F.2d 816, 820 (11th Cir.1990) (citations omitted); *United States v. Chotas*, 913 F.2d at 898 (citing *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) *(en banc), aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)).[15] It is not necessary "for the government to disprove every reasonable hypothesis of innocence, as the jury is 'free to choose among reasonable

[15] Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in this circuit. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

constructions of the evidence.' " *United States v. Jones*, 913 F.2d 1552, 1557 (11th Cir.1990) (citing *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir.1983) (quoting *United States v. Bell*, 678 F.2d at 549)). All that is necessary is that a reasonable factfinder could conclude that the evidence establishes guilt beyond a reasonable doubt. *United States v. Kelly*, 888 F.2d at 740 (citations omitted).

Therefore, we cannot reverse a conviction for insufficiency of the evidence unless we conclude that no reasonable fact-finder could find proof of guilt beyond a reasonable doubt. *United States. v. Jones*, 913 F.2d at 1557. "If there is a lack of substantial evidence, viewed in the Government's favor, from which a reasonable fact-finder could find guilt beyond a reasonable doubt, the conviction must be reversed." *United States v. Kelly*, 888 F.2d at 740 (citations omitted).

The test for sufficiency of evidence is identical regardless of whether the evidence is direct or circumstantial, and "no distinction is to be made between the weight given to either direct or circumstantial evidence." *United States v. Gonzalez*, 719 F.2d 1516, 1521, (11th Cir.1983), *cert. denied*. 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1984) (citations omitted). "Where the government seeks to meet its burden of proof on the basis of circumstantial evidence, however, it must rely on *reasonable* inferences in order to establish a prima facie case." *United States v. Villegas*, 911 F.2d 623, 628 (11th Cir.1990) (emphasis added).

Osvaldo Becerra-Flores

The only evidence presented at trial against Appellant Becerra-Flores was circumstantial. In order to find Becerra-Flores guilty, therefore, a reasonable factfinder must conclude beyond a reasonable doubt, drawing reasonable inferences from such circumstantial evidence, that the appellant did possess and conspire to possess in excess of five kilograms of cocaine with the intent to distribute. We believe that the evidence presented at trial is insufficient to allow a reasonable factfinder to conclude that Becerra-Flores was guilty beyond a reasonable doubt.

Becerra-Flores was charged both with conspiracy and with the substantive crime of possession. Because evidence of possession would also serve as circumstantial evidence of the existence of a conspiratorial agreement to possess cocaine with the intent to distribute, the facts here must be analyzed with respect to the elements of both crimes.

In order to support a conviction for conspiracy, the government must prove " 'that an agreement existed between two or more people to commit a crime, that the accused had knowledge of at least the essential objectives of that agreement, and that armed with that knowledge, he voluntarily joined or participated in the illegal venture.' " *United States v. Battle*, 892 F.2d 992, 999 (11th Cir.1990) (quoting *United States v. Pantoja-Soto*, 739 F.2d 1520, 1525 (11th Cir.1984), *cert denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985)). The existence of a conspiracy may be established through direct or circumstantial evidence. *United States v. Montes-Cardenas*, 746

F.2d 771, 778 (11th Cir.1984) (citations omitted). Thus, "direct evidence of the elements of a conspiracy is not required. A defendant's knowing participation in a conspiracy may be established through proof of surrounding circumstances such as acts committed by the defendant which furthered the purpose of the conspiracy." *United States v. Bain*, 736 F.2d 1480, 1485 (11th Cir.1984), *cert. denied*, 469 U.S. 937, 105 S.Ct. 340, 83 L.Ed.2d 275 (1984) (citation omitted).

Possession of a controlled substance with intent to distribute may also be shown by either direct or circumstantial evidence. *United States v. Pantoja-Soto*, 739 F.2d at 1525 (citing *United States v. Bustos-Guzman*, 685 F.2d 1278, 1280 (11th Cir.1982) (per curiam)). Furthermore, possession may either be actual or constructive. Constructive possession will be found where there is a " 'knowing exercise of or the knowing power or right to exercise dominion and control over the substance.' " *United States v. Poole*, 878 F.2d 1389, 1392 (11th Cir.1989) (quoting *United States v. Knight*, 705 F.2d 432, 433 (11th Cir.1983)). Even constructive possession need not be exclusive, but may be shown circumstantially through evidence of ownership, dominion, or control over the premises on which the substance is located. *Id.* (citations omitted). "[M]ere presence in the area of contraband or awareness of its location is not sufficient to establish possession." *United States v. Maspero*, 496 F.2d 1354, 1359 (5th Cir.1974).[16]

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[16] The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

We believe that the evidence presented at trial was insufficient to allow a reasonable factfinder to conclude beyond a reasonable doubt that Becerra-Flores was part of a conspiratorial agreement to possess cocaine with the intent to distribute, or that Becerra-Flores did in fact possess cocaine with the intent to distribute. Most significant to Becerra-Flores' challenge to the sufficiency of the evidence against him, is the requirement that the government prove that the appellants actually entered into an agreement with the purpose of achieving an unlawful objective. *See United States v. DeSimone*, 660 F.2d 532, 537-38 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1732, 72 L.Ed.2d 149 (1982). It is well established that "[i]nferences from the conduct of the alleged participants or from other circumstantial evidence of a scheme may provide the basis for establishing that a conspiratorial agreement existed." *United States v. Pantoja-Soto*, 739 F.2d at 1525 (citations omitted). From the evidence presented at trial against Becerra-Flores, however, we are not convinced that the government met its burden by establishing the existence of a conspiratorial agreement beyond a reasonable doubt. No evidence showed that Becerra-Flores ever entered into an agreement with any other defendant to distribute cocaine. Furthermore, Becerra-Flores was not shown to have committed any acts which would further such a conspiracy.

Similarly, we believe that the government failed to establish, by and through the evidence presented against Becerra-Flores, that he did in fact possess cocaine with the intent to distribute. It is without question that Becerra-Flores was never shown to be in actual possession of any of the bales of cocaine discovered on the

beach at Cay Sal. Constructive possession was also never established by the government at trial. It is simply not clear beyond a reasonable doubt that Becerra-Flores had a knowing power or right to exercise dominion and control over the bales of cocaine. Becerra-Flores was never seen on the beach with the bales of cocaine; in fact, none of the defendants aboard the Wilfred were seen with the cocaine. No evidence was presented which showed that Becerra-Flores or any other defendant ever left the Wilfred and went ashore on Cay Sal. Further, none of the defendants was shown to evince any dominion or control over the beach on which the cocaine was found. There was no evidence of any attempt to guard the beach or to prevent others from going ashore.

This circuit has declared that "[c]onspiracy implies much more than physical proximity to purported co-conspirators; possession entails more than physical proximity to the controlled substance." *United States v. Pantoja-Soto*, 739 F.2d at 1526. Where, as here, the government presents no evidence of the existence of a conspiratorial agreement and no evidence that a defendant did in fact possess a controlled substance with the intent to distribute, it has not met the burden of proof necessary to convict on charges of conspiracy and possession.

We recognize that the evidence presented at trial goes a long way toward establishing the defendants' presence in the area of contraband and their flight from that area when approached by law enforcement officials. We stress, however, that this alone is insufficient to support a finding of guilt beyond a reasonable doubt. It is well beyond question that mere physical presence at the scene of criminal activity is insufficient to support a

finding of guilt. *United States v. Jenkins*, 779 F.2d 606, 616 (11th Cir.1986); *United States v. Pantoja-Soto*, 739 F.2d at 1526. It is also well established that "even presence coupled with flight, without more, does not establish participation in a conspiracy." *See Also United States v. Castro*, 723 F.2d 1527, 1534 (11th Cir.1984); *United States v. DeSimone*, 660 F.2d at 537; *United States v. Lopez-Ortiz*, 492 F.2d 109, 115 (5th Cir.), *cert. denied*, 419 U.S. 1052, 95 S.Ct. 630, 42 L.Ed.2d 647 (1974). Presence and flight must be considered along with other evidence, and the reviewing court should consider whether, under the totality of the circumstances, there is sufficient evidence to support a jury verdict when the facts are viewed in the light most favorable to the government. *United States v. Lopez-Llerena*, 721 F.2d 311, 312 (11th Cir.1983) (Denial of rehearing), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 132 (1984) (citing *United States v. Pintado*, 715 F.2d 1501, 1503 (11th Cir.1983); *United States v. Blasco*, 702 F.2d 1315, 1331-32 (11th Cir.), *cert. denied*, 464 U.S. 914, 104 S.Ct. 275, 276, 78 L.Ed.2d 256 (1983)).

We do not believe that sufficient evidence was presented by the government which, in addition to presence and flight, would allow a reasonable factfinder to conclude that Becerra-Flores was guilty beyond a reasonable doubt. The initial description of the vessel spotted picking up bales, given by Customs Service pilot David Sherry, provided only the very general picture of a sportfishing vessel with a tuna tower, antennas and outriggers. In the waters off of the Florida Keys, the Bahamas, and the island of Cuba, however, that general picture would match the characteristics of literally hundreds of boats. When the Wilfred was identified by Customs Service

pilot William Radtke twelve hours later off of Cay Sal Island, it failed to match even the general description given by Sherry the night before. While the vessel spotted by Sherry was described as 40 to 50 feet in length, the Wilfred was later described by Radtke as only 30 to 40 feet in length.

Because Sherry was unable to ascertain the name of the vessel he saw, it is in no way clear that the Wilfred was the boat described by Sherry. Although Radtke stated that the Wilfred was the only boat he saw within a thirty mile radius, any number of boats could have moved in and out of the Cay Sal area in the twelve hours between Sherry's initial sighting and Radtke's identification of the Wilfred. Furthermore, Radtke only conducted a visual search of the Cay Sal area on the morning he spotted the Wilfred. A radar search may have revealed other vessels outside of that 30-mile radius. Finally, while Sherry testified that he counted twenty bales being dropped from the plane into the water, only eleven bales were recovered from the beach on Cay Sal. The fact that nine bales of cocaine were unaccounted for would seem to indicate that another vessel either removed some bales from the beach, or that the vessel which picked up the bales did not deposit all of them on the beach in the first instance. Under either scenario, it becomes even harder to establish a direct connection between the Wilfred and the bales of cocaine.

The chain of events on the morning after Sherry's initial sighting of the vessel taken together present a very suspicious scenario. We do not agree, however, that this suspicious set of facts is sufficient to establish the guilt of Becerra-Flores beyond a reasonable doubt. When Radtke

returned to the beach where he first saw the Wilfred, he noticed that the vessel was underway and heading away from the island with a cover over the back of the transom hiding the name of the boat. Flying over the island, Radtke for the first time noticed bales stacked on the high water mark of the beach, as well as roundtrip footprints leading from the area in the water where the Wilfred had been to the bales and back to the water.

These facts, viewed in the light most favorable to the government, go a long way toward establishing both the Wilfred's presence in an area where contraband was found, as well as its flight from that area. As we have noted, however, other factors have been necessary in order to supplement the inference of guilt provided by presence. *See e.g., United States v. Bergouignan,* 764 F.2d 1503, 1509 (11th Cir.1985) (where, in addition to the defendant's presence next to a vessel containing marijuana, evidence showed that traces of marijuana residue were found on his clothing), *cert denied,* 484 U.S. 1044, 108 S.Ct. 778, 98 L.Ed.2d 864 (1988). The proximity of the Wilfred to the bales of cocaine stacked on the high water mark of Cay Sal Island, therefore, is insufficient as a matter of law to allow a finding of guilt beyond a reasonable doubt.[17]

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[17] We note that even the conclusion that the Wilfred was present in the area where the cocaine was found requires an inference drawn from circumstantial evidence. To be sure, the Wilfred was first signed by Radtke in the same area where he testified that he saw roundtrip footprints leading from the water to where the cocaine was stacked on the beach. No

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We recognize the existence of other facts, in addition to presence and flight, which implicate the defendants' guilt. However, the government did not present enough additional evidence against Becerra-Flores to support a guilty verdict. When questioned by the Coast Guard as to their latest port of call, the captain of the Wilfred changed his answer after being asked to repeat it several times. In addition, while the captain stated that the purpose of the Wilfred's trip was to fish for dolphin, he had difficulty pointing to a particular position on a nautical chart where the vessel had been fishing. While this may constitute suspicious behavior, it does not rise to the level necessary to find a conspiracy to possess cocaine, or possession of cocaine, beyond a reasonable doubt.

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evidence was presented, however, which established that anyone on board the Wilfred ever left the boat to set foot on Cay Sal Island. Radtke never saw anyone on the beach. In addition, there was no physical evidence on the Wilfred, such as sand or water on deck, to indicate that anyone had left the boat, waded to shore, and then returned to the boat. And finally, no evidence was presented that the persons aboard the Wilfred were dressed in wet clothing or that wet clothes were found on board the vessel. Cases in this circuit where presence has served as a basis for establishing guilt have shown a more certain connection between defendants and contraband than exists here. *See United States v. Pantoja-Soto,* 739 F.2d at 1526 (appellants present at a service station where drugs were found in the station's service bay); *United States v. Ceballos,* 706 F.2d 1198, 1202 (11th Cir. 1983) (presence found where shrimping vessel was carrying marijuana); *United States v. Villegas-Rojas,* 715 F.2d 564, 565-66 (11th Cir.1983) (defendants present on vessel carrying marijuana), *cert, denied,*465 U.S. 1104, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1984).

Once the Coast Guard intercepted the Wilfred, a three to four hour inspection of the vessel revealed no contraband aboard. The Wilfred had fishing equipment and scuba gear on board. Although the fishing equipment was not rigged and there were no freshly caught fish on board, there was ice in the fishing box, which contained two unopened boxes of bait. *Compare United States v. Ceballos*, 706 F.2d 1198, 1202 (11th Cir.1983) (where shrimping vessel carrying marijuana lacked any rigging for shrimping, this negated any inference that crew was unaware of marijuana on board and believed the purpose of their trip was to fish); *United States v. Villejas-Rojas*, 715 F.2d 564, 565-66 (where, in addition to the defendant's presence on board a vessel carrying marijuana, evidence showed that the vessel flew no flag, had no home port and had hidden its real name, had attempted to elude the Coast Guard, and had no shrimp, ice or fishing gear on board). Once again, the fact that the fishing equipment on board the Wilfred was unrigged and the boxes of bait were unopened may give rise to an inference that the Wilfred was not, in fact, fishing. This inference will not, however, support a conclusion beyond a reasonable doubt that the persons aboard the Wilfred were part of a conspiracy to possess cocaine with intent to distribute, or that they in fact possessed cocaine with intent to distribute.

Evaluating the sufficiency of evidence to support a criminal conviction often presents the reviewing court with the difficult job of drawing a clear line where none truly exists. The standard of proof which the government must meet, however, is a stringent one, and based upon

the evidence presented at trial, we find that the government has not met this standard. Therefore, because we find that the evidence presented was insufficient to establish the guilt of Osvaldo Becerra-Flores beyond a reasonable doubt, we REVERSE his conviction on both counts.

Roberto Mieres-Borges

Appellant Roberto Mieres-Borges also challenges the sufficiency of the evidence to support his conviction. After closing arguments in the trial of Osvaldo Becerra-Flores, the jury returned a sealed verdict with respect to Becerra-Flores. Additional evidence was then presented against Appellant Roberto Mieres-Borges, which the jury considered in conjunction with the evidence already presented against Becerra-Flores. The jury subsequently found Mieres-Borges guilty on both counts charged in the indictment.

The additional evidence presented against Mieres-Borges consisted of a statement made by Mieres-Borges to a criminal investigator for the United States Customs Service. Mieres-Borges stated that the Wilfred was out fishing when an unknown aircraft overflew their position and began dropping packages. The persons aboard the Wilfred then picked up the packages and put them on the boat. After examining the contents of the packages, they elected to put the packages on a nearby island.

The statement made by Mieres-Borges directly links him to the cocaine found on the beach at Cay Sal, a link which was absent in the evidence presented against Becerra-Flores. In light of this additional evidence, we find that a reasonable factfinder could conclude that

Mieres-Borges was guilty beyond a reasonable doubt of conspiracy to possess cocaine with intent to distribute and of possession of cocaine with intent to distribute.

Mieres-Borges argues, in the alternative, that his conviction must be overturned because the government failed to establish that the weight of the cocaine seized by the law enforcement authorities exceeded five kilograms as charged in the indictment.[18] This argument is without merit. The statute under which Mieres-Borges was convicted, 46 U.S.C.App. § 1903(a),(j),[19] does not specify any

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[18] Mieres-Borges raises this alternative argument by adopting the argument of Appellant Becerra-Flores on the sufficiency of evidence issue. Because we found that there was insufficient evidence to convict Becerra-Flores, it became unnecessary to reach the issue of the weight of the cocaine with respect to Becerra-Flores.

[19] The statute provides that

(a) Vessels of the United States or vessels subject to jurisdiction of the United States.

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(j) Attempt or conspiracy

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

46 U.S.C.A.App. § 1903(a), (j) (1989).

quantity or weight of cocaine as an element of the substantive offense. *See United States v. Fuentes*, 877 F.2d 895, 899 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 347, 107 L.Ed.2d 335 (1989); *United States v. Mena*, 863 F.2d 1522, 1529-30 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 109, 107 L.Ed.2d 72 (1989). Thus, it is unnecessary for the government to prove weight or quantity beyond a reasonable doubt. *United States v. Mena*. 863 F.2d at 1530. For the above reasons, therefore, we SUSTAIN the conviction of Roberto Mieres-Borges on both counts.[20]

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[20] We have some cautionary words for two of the counsel appearing in this appeal.

Both in its brief and at oral argument, the government failed to argue that the statement made by Roberto Mieres-Borges provided sufficient evidence to sustain his conviction. When asked specifically at oral argument whether it could present any evidence which would link either of the appellants to the cocaine, beyond that which was presented against Osvaldo Becerra-Flores, the United States Attorney stated that no such evidence existed. A simple reading of the record of the proceedings in the district court would have revealed that the trial was bifurcated and that additional evidence was presented against Mieres-Borges. While we recognize the heavy case load under which the United States Attorney labors, we wish to emphasize the importance of the record to every case, and particularly to cases involving the sufficiency of evidence.

We also note that counsel for Appellant Mieres-Borges adopted the argument of counsel for Appellant Becerra-Flores on the sufficiency of evidence issue. While Rule 28(i) of the Federal Rules of Appellate Procedure certainly allows counsel for one appellant to rely on the argument of counsel for another appellant, this procedure should not be employed for the purpose of deceiving the appellate court. Counsel for Mieres-Borges defended Mieres-Borges at trial in the district

(Continued on following page)

Application of United States Sentencing Guidelines

Appellant Mieres-Borges challenges the district court's determination of his base offense level under the United States Sentencing Guidelines. Mieres-Borges first maintains that the district court erred in allowing the government to establish the weight of the cocaine for sentencing purposes under a preponderance of the evidence standard. Mieres-Borges asserts that instead, evidence beyond a reasonable doubt was necessary in order to impose sentence for possession of a particular amount of cocaine. We disagree.

The district court found, based upon the weight of the cocaine as established at trial, that Mieres-Borges should be sentenced under a base offense level of 36.[21]

(Continued from previous page)

court, and so was well aware of the statement made by the appellant which constituted additional evidence against him. Yet nowhere in the brief, whether in its statement of procedural or factual history or in its legal argument, and at no time during oral argument, was this evidence mentioned. This was made possible largely because, in light of the adoption of argument under Rule 28(i), counsel for Mieres-Borges focused only on the sentencing issue in his brief and at oral argument. We caution counsel for Mieres-Borges to be more forthright in his presentation of facts and in his argument before this court in the future.

[21] That level is applied where a defendant is convicted with respect to at least 50 kilograms but less than 150 kilograms of cocaine. United States Sentencing Commission. *Guidelines Manual*, § 2D1.1(c)(4) (Nov.1989).

The appellant argues that a base offense level of 32 was mandated[22] because the government failed to establish the weight of the cocaine necessary for application of the higher level. Because we find that the district court need only have applied a preponderance of the evidence standard in determining the weight of the cocaine, we reject appellant's reasoning.

"The Supreme Court has held that the prosecution need not ' "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." ' *United States v. Cross*, 916 F.2d 622, 623 (11th Cir.1990) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 84, 106 S.Ct. 2411, 2415, 91 L.Ed.2d 67 (1986) (citations omitted)). "In determining which facts must be proven beyond a reasonable doubt, the legislature's definition of the elements of an offense controls." *United States v. Cross*, 916 F.2d at 623; *McMillan v. Pennsylvania*, 477 U.S. at 85, 106 S.Ct. at 2415-16. "Thus, the prosecution is only required to prove beyond a reasonable doubt 'all of the elements *included in the definition of the offense* of which the defendant is charged.' " *United States v. Cross*, 916 F.2d at 623 (quoting *McMillan v. Pennsylvania*, 477 U.S. at 84, 106 S.Ct. at 2415, (citation omitted) (emphasis added in *McMillan*). District courts are required by due process to

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[22] That level is applied where a defendant is convicted with respect to at least 5 kilograms but less than 15 kilograms of cocaine. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1(c)(6) (Nov.1989).

make factual determinations at sentencing only by a preponderance of the evidence. *United States v. Ignacio Munio*, 909 F.2d 436, 439 (11th Cir.1990); *United States v. Alston*, 895 F.2d 1362, 1372-73 (11th Cir.1990).

Again, the statute under which Mieres-Borges was convicted does not include weight or quantity as an element of the offense. Therefore, the district court was only required to determine the weight of the cocaine by a preponderance of the evidence for purposes of sentencing. The district court judge found that the weight of the cocaine as established at trial was over three times that required for application of a base offense level of 36.[23] This weight was established through the testimony of a Drug Enforcement Administration agent, who testified that he lifted six or seven of the eleven bales and found them to weigh at least five kilograms each. In addition, evidence of a logbook entry from the drug storage warehouse listed the weight of the cocaine seized as 605 pounds, or 275 kilograms. We believe that this evidence was sufficient to establish, by a preponderance of the evidence, the weight of the cocaine. Accordingly, we AFFIRM the district court's application of a base offense level of 36 to Roberto Mieres-Borges.

Finally, Mieres-Borges challenges the refusal of the district court to allow a two level reduction in his base offense level based on his minor role in the offense. We have held that a district court's determination of a defendant's role in an offense is a finding of fact to which the

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[23] The judge found that it was established at trial that there were 275 kilograms of cocaine on the beach at Cay Sal.

clearly erroneous standard is applied. *United States v. Carrillo*, 888 F.2d 117, 118 (11th Cir.1989) (per curiam) (citations omitted). The district judge found no evidence that Mieres-Borges was any less culpable than his co-defendants. Because we do not find this conclusion to be clearly erroneous, we AFFIRM the district court's denial of a two point reduction in the base offense level of Roberto Mieres-Borges, under section 3B1.2 of the Sentencing Guidelines.

Conclusion

For the above reasons, we hereby REVERSE the conviction of Appellant Osvaldo Becerra-Flores on both counts. We SUSTAIN the conviction of Appellant Roberto Mieres-Borges on both counts and AFFIRM the district court's application of the United States Sentencing Guidelines to Mieres-Borges.

JOHNSON, Circuit Judge, dissenting:

I dissent. Though I agree with the majority that the evidence was insufficient to justify convicting defendant Becerra-Flores, I cannot agree that the addition of Mieres-Borges' post-arrest exculpatory statement tips the scales so far in favor of conviction that we can conclude that the jury could reasonably find Mieres-Borges guilty beyond a reasonable doubt.

"Reasonable doubt" is defined "in terms of the kind of doubt that would make a person hesitate to act." *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99 L.Ed. 150 (1954). Our Circuit has defined the exacting standard of "beyond a reasonable doubt" as

"proof of a 'convincing character' sufficient to justify reliance 'without hesitation' in the conduct of one's 'most important affairs.'" *United States v. Jones*, 663 F.2d 567, 571 (5th Cir. Unit B 1981) (quoting jury charge approved of in that case). The prosecution has the burden of proving "beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977). The crime of possession with intent to distribute with which Mieres-Borges was charged requires that the prosecution show, by proof of such convincing character that it justifies the jury's reliance upon it without hesitation, three essential elements: "(1) knowing (2) possession of a controlled substance (3) with intent to distribute it." *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983); *see also* 46 U.S.C.A.App. § 1903(a) (proof of violation of this statute, with which Mieres-Borges was specifically charged, also requires that the crime occur on board a vessel). To prove the crime of conspiracy, the government must prove by the same standard three more essential elements: (1) "an agreement existed between two or more people to commit a crime," (2) "the accused had knowledge of at least the essential objectives of that agreement," and (3) "armed with that knowledge, he voluntarily joined or participated in the illegal venture." *United States v. Pantoja-Soto*, 739 F.2d 1520, 1525 (11th Cir.1984), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985).

Our standard for reviewing the sufficiency of the evidence requires us to reverse the conviction if "there is a lack of substantial evidence . . . from which a reasonable factfinder could find guilt [without hesitation]." *United States v. Kelly*, 888 F.2d 732, 740 (11th Cir.1989). While the factfinder need not exclude every reasonable hypothesis of innocence, the evidence must be declared insufficient "where such evidence is wholly consistent with an obvious and reasonable innocent interpretation." *Id.* Rather than demonstrating guilt, Mieres-Borges' exculpatory statement more sensibly implicates an innocent explanation of what the defendants were doing in proximity to the cocaine. The defendants were in the area; an unfamiliar plane flew overhead dropping packages; they fished them out of the water and examined them; they decided to get rid of them by stacking them on the beach.

Mieres-Borges' explanation goes a long way toward explaining some of the peculiarities of this case. First, on the evening of November 7th the customs pilot observed the smugglers' plane drop at least twenty bales, but only eleven were found on the beach. If the defendants picked up some of these bales out of curiosity, it would make sense that once they realized that the bales contained contraband and began to appreciate the consequences of their possession of the bales they would not pursue the remaining ones. Second, there was testimony at trial by the agents that, in the twelve hours between the sighting of the boat on the evening of November 7th and the sighting the next morning, the defendants' boat could have traveled hundreds of miles. But the pilot spotted the boat on the morning of the 8th only 30 miles from the drop site. If the defendants were the smugglers, it makes no sense that they would stay in the area of the drop site, waiting for law enforcement officers to discover them. Though they may not have known that they had been observed on the evening of the 7th, it still is not typical

criminal behavior to dally at the scene of the crime for twelve hours. Third, it remains unclear why the defendants, if they were actually the smugglers, would have left the cocaine in plain view on the beach, totally unprotected. Though Cay Sal Bank is an undeveloped island, there was testimony that it is a popular fishing and diving spot. It seems that the true smugglers would be very interested in protecting and concealing their investment. But the Coast Guard did not even find a weapon on board the defendants' boat. Fourth, though the agent testified that Mieres-Borges told him in his post-arrest statement that the defendants had examined the packages, there was no evidence that the defendants ever opened any of the packages. On cross-examination the agent clarified that Mieres-Borges had merely stated that they had examined the packages and then decided to put them on the beach. Mieres-Borges apparently did not say that he opened any of the packages. The government did not show that any of the bales found on the beach had been opened. Moreover, there was testimony that the Coast Guard did not find even any residue of cocaine on the boat in spite of an extensive search. If the defendants had opened a package, as drug dealers normally would for testing upon receipt of a delivery, then there surely would have been some residue to be found somewhere on board. In sum, the most reasonable conclusion in this case is that the defendants were not the intended recipients of the dropped bales.

The government did not meet its burden in presenting evidence on each element of the charges which would allow a jury to convict beyond a reasonable doubt or "without hesitation." The exculpatory statement did in

fact link Mieres-Borges to the cocaine, as the majority points out, thus showing he had been in possession of it. But the government never put on any direct evidence showing intent to distribute. The crime of possession with intent to distribute may be proven through circumstantial evidence. *Vera*, 701 F.2d at 1357. But here, where there is a reasonable and innocent explanation of the circumstances, to infer intent is simply too long a leap. This is a leap which surely cannot be made "without hesitation." Likewise, the evidence of a conspiracy was totally circumstantial. Though proof of conspiracy by circumstantial evidence is also permissible under *Vera*, and many other cases, it is a long leap to conclude that there existed an agreement between the three defendants and that Mieres-Borges knew the essential objectives of the conspiracy. In sum, Mieres-Borges' exculpatory statement seems to make at least as much sense out of the evidence as the conclusion that the defendants were smuggling drugs. The standard of "beyond a reasonable doubt" is an exacting one. I cannot say that a jury could find "without hesitation" that the government has proven each of the elements of these crimes. I therefore would hold the evidence against Mieres-Borges to be insufficient. Consequently, I would not reach the sentencing issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(Caption Omitted In Printing)

CASE NUMBER:

88-10035-CR – KING

Transcipt [sic] of proceedings before the Honorable James Lawrence King, Chief United States District Judge, at Miami, Florida, on the 11th day of January, 1991.

[2] THE COURT: All right. Be seated, please.

Let's see. This would be Mr. Abrams and Mr. Oosterbaan on U.S. versus Ortega-Rodriguez.

MR. ABRAMS: Yes, your Honor. Good morning.

MR. OOSTERBAAN: Good morning. Your Honor.

THE COURT: Mr. Abrams, you have filed a motion for judgment of acquittal. Is this timely?

MR. ABRAMS: Judge, pursuant to United States versus DeBernardo, 880 Fed. 2nd 1216, 1989, 11th Circuit case, we believe that it is.

Specifically on page 1225 of that opinion, footnote 4 as quoted in our memorandum, the rulings of criminal procedure of course do not demarcate the outer limits of a trial court's authority to vacate a judgment of conviction. Under its inherent supervisory power a District Court may consider an untimely motion, or may grant such motion when it retains jurisdiction over the case.

The rules must be applied to provide for the just determination of every case and must be construed to secure simplicity and procedural fairness in administration and the limitation of unjustifiable expense and delay.

Consequently, pursuant to this Court's supervisory powers, we believe that the Court can entertain a motion pursuant to rule 29 C at this time.

THE COURT: Mr. Oosterbaan.

[3] MR. OOSTERBAAN: Your Honor, the government first states that the case cited by the defense is not support for what it requests in this case. The case itself stands for a ruling on a rule 33, not a motion for judgment of acquittal.

The footnote that is cited does cite other circuit authority for such motions. But once again the case in the 11th Circuit does not stand for that proposition.

Second of all, and most importantly, this defendant as your Honor is aware will not be entitled to an appeal. So his request for relief is based on an appeal that a codefendant was rightly entitled to. He is is [sic] not entitled to such an appeal.

So he would be gaining a benefit when the case law suggests that he is not entitled to that benefit. Under policy and long standing case law he is not entitled to appeal and he should not derive benefit as his codefendant did.

That is not conceding that the motion should be granted on the merits to begin with.

THE COURT: I think the law is rather clear when a person becomes and remains a fugitive he waives his right to appeal. I don't know much that I can do for him at this time.

The motion is denied.

I am inclined under the circumstances to not penalize him beyond what the minimum mandatory requirement of law is.

Let's see. According to the pre sentence investigation report, the minimum sentence is one hundred and 88 to 2 hundred [4] 35 months. Although there has been a recommendation by the probation officer for a higher amount, it would seem to me to be appropriate to sentence him to the lower range, although I have not heard from either of you. And I would not penalize him in this case.

Now, how does he compare with the other defendants on this? Let me invite counsel for the defense to address that point.

Where does he fit into this? I should treat him fairly with the others, but –.

MR. ABRAMS: Judge, your Honor sentenced all 3 defendants identically on June 15, 1989. And each received the sentence of 2 hundred 35 months.

However, we would point out that in the PSI there are distinctions drawn, say, between Mr. Ortega and Mr. Bessara in that Mr. Bessara is classified in the PSI of having been the captain of the Wilfred.

THE COURT: Is there any reason why he should not be sentenced to the lower end of the guidelines? He has another conviction on a bail jumping but he should not be penalized on this case for that.

MR. OOSTERBAAN: The government doesn't take a position on that. We think your first sentence in this case was appropriate.

THE COURT: I am inclined to sentence him to the lower end of the guideline.

[5] MR. ABRAMS: Without waiving any argument that we have raised right now in regard to the propriety of the conviction at this point, I would urge your Honor, and I did not raise this before this moment with probation, but frankly this is beausc I didn't even know of the opinion until approximately the day before I filed the motion for judgment of acquittal.

Pursuant to 5K1 point zero of the sentencing guideline, this Court can depart downward based on circumstances which were not taken into consideration by the sentencing commission in formulating the guidelines.

THE COURT: I am not going do [sic] do that. I think that in sentencing him to one hundred 88 months I am doing as much for him as I am inclined to do.

Jose Antonio Ortega it is ordered and adjudged that you be remanded to the custody of the Attorney General of the United States or the Bureau of Prisons for a period of one hundred 88 months, five years supervised release and one hundred dollar assessment. The defendant is remanded to the custody of the United States Marshal.

Gentleman, I am going to have to take a brief recess for a few minutes and I will be back with you on the next sentencing.

(Court in recess)

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA V. JOSE ANTONIO ORTEGA RODRIGUEZ (33156-004)	**JUDGMENT IN A CRIMINAL CASE** **(For Offenses Committed On or After November 1, 1987)** Case Number: 88-10035-CR-KING

(Name of Defendant) /s/ Stewart Abrams, AFPD
Defendant's Attorney

THE DEFENDANT:

___ pleaded guilty to count(s) _____ .

_x_ was found guilty on count(s) One and Two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
46:1903(a)(g) 18:2	Possession with intent to distribute cocaine		One
46:1903(j)(g)	Conspiracy to possess with intent to distribute		Two

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

x It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) One and Two, which shall be due x immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
591-48-0871

Defendant's Date of Birth:
09-25-63

Defendant's Mailing Address:

In custody

Defendant's Residence Address:

In custody

January 11, 1991
Date of Imposition of Sentence

JAMES LAWRENCE KING
Signature of Judicial Officer

JAMES LAWRENCE KING,
Chief Judge
Name & Title of Judicial Officer

January 11, 1991
Date

Defendant: JOSE ANTONIO ORTEGA RODRIGUEZ
Case Number: 88-10035-CR-KING

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHTY EIGHT (188) MONTHS, to run concurrently.

___ The court makes the following recommendations to the Bureau of Prisons:

x The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ a.m.
___ at _____ p.m. on _____.
___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____.
___ as notified by the United States marshal.
___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment–Page 3 of 3

Defendant: JOSE ANTONIO ORTEGA RODRIGUEZ
Case Number: 88-10035-CR-KING

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

___ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-10035-Cr-KING

(Caption Omitted In Printing)

NOTICE OF APPEAL

Notice is hereby given that Jose Antonio Ortega Rodriguez, the Defendant above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Final Judgment entered in this action on the 23rd day of January, 1991.

JAMES R. GAILEY
FEDERAL PUBLIC
DEFENDER

By: /s/ Stewart G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
Florida Bar No. 371076
301 North Miami Avenue
Miami, Florida 33128
(FTS) 350-6900
(305) 536-6900

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA

V.

JOSE ANTONIO ORTEGA RODRIGUEZ
(33156-004)

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number:
90-398-
CR-KING

/s/ Yolanda Morales, Esq.
Defendant's Attorney

THE DEFENDANT:

___ pleaded guilty to count(s) _____ .

_x_ was found guilty on count(s) One and Two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:401(3)	Contempt of court		One
18:3146	Failure to appear		Two

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____ , and is discharged as to such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

_x_ It is ordered that the defendant shall pay a special assessment of $100.00 , for count(s) One and Two , which shall be due _x_ immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
591-48-0871

Defendant's Date of Birth:
09-25-63

Defendant's Mailing Address:

In custody

Defendant's Residence Address:

In custody

April 12, 1991
Date of Imposition of Sentence

/s/ James Lawrence King
Signature of Judicial Officer

JAMES LAWRENCE KING,
Chief Judge
Name & Title of Judicial Officer

April 15, 1991
Date

Judgment–Page 2 of 3

Defendant: JOSE ANTONIO ORTEGA-RODRIGUEZ
Case Number: 90-398-CR-KING

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWENTY-ONE (21) MONTHS as to Counts One and Two to run concurrently to each other. The sentence imposed in Case No. 90-398-CR-KING shall run consecutively to the sentence imposed in Case No. 88-10035-CR-KING.

___ The court makes the following recommendations to the Bureau of Prisons:

xx The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ at _____ a.m. / p.m. on _____ .

___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

___before 2 p.m. on _____ .

___as notified by the United States marshal.

___as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment–Page 3 of 3

Defendant: JOSE ANTONIO ORTEGA RODRIGUEZ
Case Number: 90-398-CR-KING

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

___ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5643

D.C. Docket No. 88-10035-CR-JLK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO MIERES-BORGES,
OSVALDO BECERRA-FLORES,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before FAY and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction of appellant Osvaldo Becerra-Flores on both counts is hereby REVERSED; the judgment of conviction of appellant Roberto Mieres-Borges on both counts is

hereby SUSTAINED; and the sentence imposed by the District Court as to appellant Mieres-Borges is hereby AFFIRMED.

JOHNSON, Circuit Judge, dissented and filed an opinion.

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Entered: December 18, 1990
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: MAY 1, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5083

UNITED STATES OF AMERICA,

Appellee,

- versus -

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MOTION TO DISMISS APPEAL AND MOTION
TO EXTEND TIME FOR BRIEFING
SCHEDULE PENDING DECISION ON
MOTION TO DISMISS

DEXTER W. LEHTINEN
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LINDA COLLINS HERTZ
Chief, Appellate Division

ANDREW G. OOSTERBAAN
Assistant United States Attorney

Of Counsel

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

District Judge	:	Hon. James L. King
Magistrate	:	Hon Hugh J. Morgan
Attorneys	:	Dexter W. Lehtinen United States Attorney
		Odilio M. Diaz, Andrew G. Oosterbaan, Assistant United States Attorneys
		James R. Gailey, Federal Public Defender
		Stewart G. Abrams, Assistant Federal Public Defender
Parties	:	Jose Antonio Ortega-Rodriguez

/s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
Assistant United States Attorney

AGO:jn

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5083
(D. Ct. No. 88-10035-CR-KING)

UNITED STATES OF AMERICA,
Appellee,

v.

JOSE ANTONIO ORTEGA-RODRIGUEZ,
Appellant.

MOTION TO DISMISS APPEAL AND MOTION TO EXTEND TIME FOR BRIEFING SCHEDULE PENDING DECISION ON MOTION TO DISMISS

Appellee United States of America moves to dismiss the appeal of appellant Jose Antonio Ortega-Rodriguez.

INTRODUCTION AND FACTS

1. On March 24, 1989, appellant Jose Antonio Ortega-Rodriguez was found guilty of conspiring to possess with intent to distribute and possession with intent to distribute cocaine on board a United States registered vessel, in violation of Title 46 United States Code, Sections 1903(a), (g) and (j), and Title 18 United States Code, Section 2 (R1:61)

2. The trial court scheduled appellant's sentencing for June 15, 1989, at 9:00 a.m., and gave appellant both oral and written notice of the sentencing date (R1:65).

3. Appellant failed to appear for his sentencing (R1:77), and became a fugitive from justice (R1:79). He

was sentenced in absentia to a period of incarceration of 235 months (R1:81).

4. On May 24, 1990, after being a fugitive for almost one year, appellant was arrested (R1:100).

5. On June 21, 1990, appellant was indicted for contempt of court and for failing to appear for sentencing.[1]

6. On January 7, 1991, appellant was found guilty of both counts in the indictment.

7. On appellant's motion, his sentence imposed on June 15, 1989, was vacated by the District Court on October 12, 1990 (R1:104; 112). Subsequently, on January 11, 1991, appellant was resentenced by the District Court to a period of incarceration of 188 months (R1:119; 120).

8. Appellant then appealed (R1:121).[2]

SUMMARY OF THE ARGUMENT

In his appeal, appellant argues that this Court's decision in *United States v. Mieres*, 919 F.2d 652 (11th Cir. 1990), wherein a co-defendant's conviction was reversed

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[1] The district court case number for this case is 90-398-Cr-King. The appeals court number is unknown.

[2] The record on appeal for case no. 91-5083 consists of three volumes. The volumes are numbered and designated one through three. Volume one contains the pleadings, motions and other papers. Volume two is the transcript of the sentencing proceedings on June 15, 1990. Volume three is the transcript of the sentencing hearing on January 11, 1991.

for insufficient evidence, should lead this Court to similarly reverse appellant's conviction. Appellant asserts that the evidence presented against him was identical to the evidence against co-Defendant Becerra, whose conviction was reversed. Notably, appellant mentions nothing of his flight after conviction which places him in an entirely different appellate posture.

According to well-settled precedent in this Circuit, appellant is precluded from raising trial issues, such as insufficient evidence, on appeal. By fleeing and becoming a fugitive after his conviction and prior to sentencing, appellant waived his right to appeal from his conviction. Therefore, he is not entitled to benefit from the properly preserved appellate rights of his co-defendant.

ARGUMENT

APPELLANT, WHO BECAME A FUGITIVE AFTER BEING CONVICTED BY A JURY AND BEFORE SENTENCING, CANNOT NOW CHALLENGE HIS CONVICTION ON APPEAL.

In *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982) *cert. denied*, 460 U.S. 1015, 1035 Cr. 1259 (1983), this Court held "that a defendant who flees after conviction but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." *See also United States v. London*, 723 F.2d 1538 (11th Cir. 1984).

Appellant fled after his conviction and before his sentencing (R1:134), and for almost one year was a fugitive from justice. Under the holding in *Holmes*, he cannot

now challenge his 1989 conviction for conspiracy and possession with intent to distribute cocaine. Likewise, appellant is not entitled to benefit from the properly preserved rights of appeal exercised by his co-defendant.

Accordingly, appellant is precluded from raising the issues cited on appeal. This Court should, therefore, dismiss his present appeal.

CONCLUSION

According to well-established case law, appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction. Consequently, this Court should dismiss his appeal. Additionally, appellee respectfully requests that this Honorable Court extend the time for the briefing schedule pending a decision on appellee's Motion to Dismiss Appeal.

Respectfully submitted,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

By: /s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of May, 1991, to Stewart G. Abrams, Esquire, Assistant Federal Public Defender, Attorney for Appellant, 301 North Miami Avenue, Miami, Florida 33128.

/s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED STATES
ATTORNEY

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-5083

(Caption Omitted In Printing)

APPELLANT'S RESPONSE TO GOVERNMENT'S MOTION TO DISMISS APPEAL AND MOTION TO EXTEND TIME FOR BRIEFING SCHEDULE PENDING DECISION ON MOTION TO DISMISS

Appellant Jose Antonio Ortega Rodriguez (hereinafter "Defendant"), through counsel, respectfully responds to and opposes the government's motion to dismiss his appeal.

STATEMENT OF FACTS

Initially, Defendant does hereby adopt and incorporate by reference the statement of facts as delineated in his brief which was filed on April 24, 1991.[1] In his brief, Defendant respectfully urges this Court to adopt its ruling in *United States v. Mieres*, 919 F.2d 652 (11th Cir. 1990) which essentially is the instant case. In addition, Defendant points out several factual inaccuracies in the government's motion.

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[1] Notably, the government has waited until May 14, 1991, or just ten days prior to the due date of its answer brief to file the instant motion. Defendant's notice of appeal was filed on January 18, 1991.

First, the government relates that "the trial court scheduled Appellant's sentencing for June 15, 1989, at 9:00 a.m., and gave Appellant both oral and written notice of the sentencing date. (R1-65)." In fact, notice of sentencing date was mailed by the Court on June 15, 1989, (for 1:30 p.m.) and was issued to the counsel. At no time did Defendant receive oral notice of the sentencing date from the District Court. In addition, in making reference to Defendant's brief, the government alleges:

> Appellant asserts that the evidence presented against him was identical to the evidence against co-defendant Becerra, whose conviction was reversed. Notably, Appellant mentions nothing of his flight after conviction which places him in an entirely different appellant posture.

See Government's Motion to Dismiss, pp. III and IV

In fact, defendant specifically referenced in his brief that he was sentenced *in absentia* by the District Court and that an arrest warrant was issued. *See* Defendant's Brief, p.2. In addition, Defendant reiterates that the evidence presented by the government **at trial** as to him was identical to that which was introduced against co-defendant Becerra. Defendant's status after the return of the jury verdict in no way alters the evidence which was presented to and entertained by the jury in consideration of the instant matter.

Finally, on January 7, 1991, Defendant was found guilty of contempt of court and failure to appear for sentencing in violation of Title 18, United States Code, Sections 401(3) and 3146 respectively. The referenced case arose out of Defendant's conduct attributable to the

instant case. On April 15, 1991, Defendant was sentenced by the Honorable James Lawrence King to the custody of the Bureau of Prisons for a term of twenty-one months as to each of the referenced counts, said sentence to run consecutively to that which was imposed in the instant case.[2] (Please see attached Exhibit "A").

MEMORANDUM OF LAW

Defendant acknowledges the prevailing case law in this circuit whereby this Court may dismiss an appeal due to apparent flight of the Appellant. *See United States v. London*, 723 F.2d 1538 (11th Cir. 1984); however, the Court also retains discretion to entertain an appeal in appropriate cases despite the Defendant's flight. *See United States v. Matista*, 1991 W.L. 74711 (2nd Cir. decided May 10, 1991). *See also United States v. Persico*, 853 F.2d 134 (2nd Cir. 1988) ("There is no constitutional defect in a policy of dismissing the appeals of fugitive defendants even after their recapture . . . of course, we remain mindful that 'we have discretion to reach the merits in an appropriate case.' ")

Defendant respectfully urges this Court to find that the instant matter is an "appropriate case". The identical evidence which was presented as to co-defendant Becerra simultaneously was introduced against Defendant. this Court has determined that the evidence presented at trial against Becerra was insufficient as a matter of law to warrant conviction for the crimes charged. *Mieres, supra.*

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[2] Presently, Defendant is serving a sentence of 188 months as to the instant case.

Second, and most significantly, by separate proceeding and conviction, Defendant has been punished for his failure to appear at sentencing by having received a sentence of twenty-one months of incarceration. Co-defendant Becerra, who at trial was in a factually identical posture to Defendant, has been discharged from custody by Order of December 21, 1990. (R1-115). Based on *identical* trial evidence, Defendant presently is serving a sentence of one hundred eighty-eight months of incarceration.

Finally, one of the reasons that courts have determined that a Defendant who becomes a fugitive has waived his right to appeal until he is recaptured is that if a Defendant's appeal was successful, it would place an unfair burden on the government since witnesses or other evidence may become unavailable. *See United States v. Baccollo,* 725 F.2d 170 (2nd Cir. 1983). The instant case presents no such retrial problem whereas a ruling from this Court which is consistent with the *Mieres* decision, would result in a dismissal as opposed to a retrial.

CONCLUSION

In sum, by its motion, the government seeks to have Defendant serve a sentence in excess of fifteen years of incarceration beyond the penalty for jumping bond because he failed to appear for sentencing. He has been sentenced to twenty-one months for his failure to appear and is cognizant that any term of incarceration would have been minimal had he been present on the sentencing date. Defendant urges this Court to exercise its discretion and not dismiss the instant appeal whereas this Court is

in the extremely rare posture of having litigated previously the merits of the precise issues of which Defendant seeks redress and determined that the proof to substantiate the lengthy term of incarceration imposed was insufficient as a matter of law.

WHEREFORE Defendant respectfully requests that the government's motion to dismiss be denied.[3]

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: /s/ Steward G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
Florida Bar No. 371076
301 North Miami Avenue
Miami, Florida 33128
(FTS) 350-6900

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed this 21st day of May, 1991, to Andrew Oosterbaan, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Stewart G. Abrams
Steward G. Abrams

---

[3] As an alternative to an immediate ruling on the instant motion, and in the interests of judicial economy, Defendant respectfully suggests that this Court carry the instant issue with the appeal so that the merits of this motion may be addressed more fully in the briefs and potentially, at the time of oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5083

(Caption Omitted In Printing)

On Appeal from the United States
District Court for the Southern District of Florida

BEFORE: KRAVITCH, HATCHETT and CLARK, Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss is GRANTED.

Appellee's motion to extend time for briefing schedule pending decision on motion to dismiss is DENIED as moot.

Filed July 19, 1991

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-5083

(Caption Omitted In Printing)

MOTION TO REINSTATE APPEAL
AND FOR RECONSIDERATION OF ORDER
GRANTING APPELLEE'S MOTION TO DISMISS

Defendant-Appellant Jose Antonio Ortega-Rodriguez (hereinafter "Defendant"), through counsel and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully moves for reinstatement of his appeal and for reconsideration of the order which granted appellee's Motion to Dismiss, and as grounds therefore says:

1. Defendant, along with two co-defendants, was charged by indictment with possession with intent to distribute in excess of five kilograms of cocaine on board a United States registered vessel and with conspiracy to commit the aforesaid act, in violation of Title 46, United States Code Appendix, Sections 1903(a) and (j) respectively.

2. On March 20, 1989, Defendant and his co-defendants proceeded to trial. The trial was bifurcated since co-defendant Mieres-Borges made an inculpatory statement while Defendant and co-defendant Becerra-Flores remained silent. Consequently, the jury heard evidence as to all defendants without Mieres inculpatory statement and then deliberated as to Defendant and Becerra-Flores.

After delivering a verdict which was sealed by the District Court, the jury then entertained evidence pertaining to Mieres-Borges' statement. Jury deliberation again took place and a verdict was returned accordingly. On March 24, 1989, all defendants were found guilty as to both charges. Defendant was permitted to remain on bond pending sentencing.

3. On April 24, 1989, or one month after the verdict was returned, an order was entered whereby a sentencing date was scheduled.

4. On June 22, 1989, Defendant, over defense objection, was sentenced *in absentia* by the District Court to a term of imprisonment of two hundred and thirty-five months as to Counts I and II to be served concurrently. This period of supervision was to be followed by a five-year term of supervised release. In addition, a special assessment of one hundred dollars was imposed.

5. On or about May 25, 1990, Defendant was arrested and remanded to the custody of the United States Marshal. Shortly thereafter, i.e. on June 7, 1990, Defendant filed his Motion to Vacate Sentence and for Resentencing. This motion was granted by the District Court.

6. Between June 22, 1989, and May 25, 1990, i.e. the date on which Defendant was sentenced *in absentia* and the date on which Defendant was arrested and remanded to the custody of the United States Marshal, the co-defendants appealed their convictions to this Court. On December 18, 1990, this Court reversed the conviction of co-defendant Becerra-Flores who, in a factual context, was situated identically to Defendant in terms of the trial

record in the instant case. *See United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990) (Appended hereto as Appendix "A").

7. On January 9, 1991, Defendant filed his motion for judgment of acquittal based on the *Mieres* decision. This motion was denied by the District Court on January 11, 1991, whereupon Defendant was sentenced to the custody of the Bureau of Prisons for a term of one hundred and eighty-eight months as to Counts I and II. This term was to be followed by a five-year period of supervised release.

8. On January 28, 1991, Defendant filed his Notice of Appeal. Subsequently, Defendant submitted his appellate brief on April 24, 1991.

9. On May 15, 1991, or in excess of three months after Defendant filed his Notice of Appeal after Defendant prepared his brief, the government moved to dismiss the appeal and to extend time for briefing schedule pending decision on Motion to Dismiss. Citing *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983), and *United States v. London*, 723 F.2d 1538 (11th Cir. 1984), the government argued essentially that because Defendant fled after conviction but before sentencing, he waived his right to appeal unless he could establish that his absence was due to matters completely beyond his control.

10. On May 21, 1991, Defendant responded to the government's motion. Although Defendant recognized as precedent the cases cited by the government, Defendant urged this Court to follow and adopt *United States v. Matista*, 932 F.2d 1055 (2nd Cir. 1991) and *United States v.*

Persico, 853 F.2d 124 (2nd Cir. 1988). Although the referenced cases provide that there is no constitutional infirmity to dismissal of an appeal for a fugitive defendant after recapture, courts retain the discretion to reach the merits of the appeal in the appropriate case. (Copies of the *Matista* and *Persico* decisions are attached hereto as Appendixes "B" and "C" respectively).

11. Defendant respectfully requests that this Court reconsider its Order of July 19, 1991, wherein his appeal was dismissed. In granting Defendant his appeal, the orderly administration of justice has not been compromised in that the appellate process as to this case continued in Defendant's absence. The *Mieres* decision recognized the factual similarities between all defendants and the one particular statement which separated Defendant and co-defendant Becerra-Flores from co-defendant Mieres. The statement attributable to co-defendant Mieres was the pivotal point as to whether the District Court's decision which the jury never heard as to Defendant or Becerra, was to be affirmed or reversed. This Court determined that Mieres' statement provided a sufficient link between him and the subject cocaine. At the same time, this Court determined that the evidence against Becerra, without Mieres' statement, was insufficient as a matter of law. Defendant is situated *identically* to Becerra.

12. Consequently, this Court already has considered in a timely fashion, the appeal of the identically-situated co-defendant and ruled accordingly. Moreover, the *Mieres* decision made numerous references to *all* defendants as opposed to just Mieres and Becerra.

13. This Court is in the unique position of having determined the precise legal issues to be raised in Defendant's appeal which are based on facts which this Court previously has entertained. Consequently, no new issues are to be brought before the Court in regard to that which occurred at trial. This Court is not being asked to review a case which has grown stale as a result of Defendant's absence or through the passage of time. Defendant would present his brief and argument in the identical fashion to that which was provided by co-defendant Becerra.

14. Finally, Defendant requests reconsideration so as to prevent a manifest injustice. He was convicted for failure to appear for sentencing and was sentenced to a term of incarceration of twenty-one months on April 12, 1991. Defendant is being punished for his failure to appear. Defendant's sentence as to the instant case is tantamount to additional punishment for the same conduct whereas, but for his failure to appear, the District Court's sentence would have been reversed. Consequently, in essence Defendant is serving a term of incarceration in excess of fifteen years in addition to the twenty-one months he received for his conviction for failure to appear as a result of the same conduct.

15. As an alternative to dismissal of Defendant's appeal, Defendant urges this Court to carry the issue of dismissal with his appeal. In its answer brief, the government can address the propriety of a dismissal by this Court and why this Court can not and/or should not reach the merits of Defendant's argument, particularly in light of the *Mieres* decision. In his reply brief, Defendant would address more fully why his appeal should be entertained and why he and co-defendant Becerra should

be treated in a similar fashion. Defendant expressly notes that even if he was to prevail on appeal, that his would not affect the sentence based on his conviction for failure to appear and he would serve the remainder of his twenty-one month sentence.

WHEREFORE Defendant respectfully requests that his appeal be reinstated and that this Court reconsider its Order of dismissal for the reasons cited herein.

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: /s/ Stewart G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
Florida Bar No. 371076
301 North Miami Avenue
Miami, Florida 33128
(FTS) 350-6900

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed this 9th day of August, 1991, to Andrew Oosterbaan, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Stewart G. Abrams
Steward G. Abrams

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5083
(D.Ct. No. 88-10035-CR-KING)

(Caption Omitted In Printing)

(Filed August 23, 1991)

GOVERNMENT'S RESPONSE TO APPELLANT'S MOTION TO REINSTATE APPEAL AND FOR RECONSIDERATION OF ORDER GRANTING APPELLEE'S MOTION TO DISMISS

Appellee United States of America respectfully responds to appellant Jose Antonio Ortega-Rodriguez's Motion to Reinstate Appeal and for Reconsideration of Order Granting Appellee's Motion to Dismiss as follows.

INTRODUCTION AND FACTS

1. On March 24, 1989, appellant Jose Antonio Ortega-Rodriguez was found guilty of conspiring to possess with intent to distribute and possession with intent to distribute cocaine on board a United States registered vessel, in violation of Title 46 United States Code, Sections 1903(a), (g) and (j), and Title 18 United States Code, Section 2 (R1:61)

2. The trial court scheduled appellant's sentencing for June 15, 1989, at 9:00 a.m., and gave appellant both oral and written notice of the sentencing date (R1:65).

3. Appellant failed to appear for his sentencing (R1:77), and became a fugitive from justice (R1:79). He

was sentenced in absentia to a period of incarceration of 235 months (R1:81).

4. On May 24, 1990, after being a fugitive for almost one year, appellant was arrested (R1:100).

5. On June 21, 1990, appellant was indicted for contempt of court and for failing to appear for sentencing.[1]

6. On January 7, 1991, appellant was found guilty of both counts in the indictment.

7. On appellant's motion, his sentence imposed on June 15, 1989, was vacated by the District Court on October 12, 1990 (R1:104; 112). Subsequently, on January 11, 1991, appellant was resentenced by the District Court to a period of incarceration of 188 months (R1:119; 120).

8. Appellant then appealed (R1:121).[2] His brief was filed on April 24, 1991.

9. On May 15, 1991, appellee filed a Motion to Dismiss Appeal and Motion to Extend Time for Briefing Schedule Pending Decision on Motion to Dismiss. Appellant responded in objection on May 21, 1991.

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[1] The district court case number for this case is 90-398-Cr-King. The appeals court number is unknown.

[2] The record on appeal for case no. 91-5083 consists of three volumes. The volumes are numbered and designated one through three. Volume one contains the pleadings, motions and other papers. Volume two is the transcript of the sentencing proceedings on June 15, 1990. Volume three is the transcript of the sentencing hearing on January 11, 1991.

10. This Court granted appellee's motion and dismissed appellant's appeal on July 19, 1991.

APPELLANT'S RECONSIDERATION MOTION

1. In his appeal, appellant argued that this Court's decision in *United States v. Mieres*, 919 F.2d 652 (11th Cir. 1990), wherein a co-defendant's conviction was reversed for insufficient evidence, should lead this Court to similarly reverse appellant's conviction. Appellant asserted that the evidence presented against him was identical to the evidence against co-defendant Becerra, whose conviction was reversed.

2. In response to appellee's motion to dismiss appeal, appellant urged this Court to follow and adopt case law outside this circuit, and to consider the merits of appellant's appeal notwithstanding the well-settled precedent in this Circuit which precludes appellant from raising trial issues, such as insufficient evidence, on appeal. According to this case law, by fleeing and becoming a fugitive after his conviction and prior to sentencing, appellant waived his right to appeal from his conviction.

3. Appellant's present motion raises no new issues or factual considerations. The motion offers no basis for reconsideration that has not previously been presented and argued to this Court.

ARGUMENT

1. In *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982) *cert. denied*, 460 U.S. 1015, 1035 Cr. 1259 (1983), this Court held "that a defendant who flees after

conviction but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." *See also United States v. London*, 723 F.2d 1538 (11th Cir. 1984).

2. Appellant fled after his conviction and before his sentencing (R1:134), and for almost one year was a fugitive from justice. Under the holding in *Homes*, he is precluded from challenging his 1989 conviction for conspiracy and possession with intent to distribute cocaine. Likewise, appellant is not entitled to benefit from the properly preserved rights of appeal exercised by his co-defendant. Accordingly, this Court properly dismissed appellant's appeal.

3. In his Motion to Reinstate Appeal and for Reconsideration of Order Granting Appellee's Motion to Dismiss, appellant presents precisely the same issues, factual considerations and legal arguments previously offered to this Court. Nothing in his present motion was not already considered by this Court prior to the Order dismissing appellant's appeal. As no basis for reconsideration exists, appellant's motion should be denied.

CONCLUSION

According to well-established case law, appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction. Consequently, this Court properly dismissed his appeal. As his present motion presents no new

issues, factual considerations or legal argument, appellant's request for reconsideration should be denied.

Respectfully submitted,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

By: /s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED
STATES ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of August, 1991, to **Stewart G. Abrams**, Esquire, Assistant Federal Public Defender, Attorney for Appellant, 301 North Miami Avenue, Miami, Florida 33128.

/s/ Andrew G. Oosterbaan
ANDREW G. OOSTERBAAN
ASSISTANT UNITED
STATES ATTORNEY

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-5083

(Caption Omitted In Printing)

REPLY TO GOVERNMENT'S RESPONSE TO
APPELLANT'S MOTION TO REINSTATE APPEAL
AND FOR RECONSIDERATION OF ORDER
GRANTING APPELLEE'S MOTION TO DISMISS

Defendant-appellant Jose Antonio Ortega-Rodriguez (hereinafter "Defendant"), through counsel, respectfully replies to the government's response to [his] Motion to Reinstate Appeal and for Reconsideration of Order Granting Appellee's Motion to Dismiss[1] and says:

1. The government is well aware that Defendant has received a sentence of twenty-one months for his failure to appear at the sentencing. Defendant will serve this twenty-one months regardless of the outcome of his appeal in the instant case.

2. Similarly, the government is aware that Defendant is situated identically to co-defendant Becerra as to the facts and circumstances of the underlying case and the referenced co-defendant has been released from incarceration based on the reversal of his conviction by this Court.

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[1] Although the certificate of service in the government's response is dated August 20, 1991, Defendant did not receive a copy of same until September 16, 1991.

The prosecutor is "the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *United States v. Agurs*, 427 U.S. 97 (1976), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935). Despite this duty, by attempting to deny Defendant his appeal, the government propounds that Defendant should serve an additional one hundred and eighty-eight months of incarceration for conduct which it knows that this Court has determined is insufficient evidence of a crime. As noted, Defendant already is serving twenty-one months as a result of his errant behavior in regard to his non-appearance at sentencing. Unsatisfied, the government wishes Defendant to serve an additional fifteen plus years.

As an alternate basis for appellate review, on January 9, 1991, Defendant filed a renewed Motion for Judgment of Acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure.[2] Although the referenced motion was filed well beyond the seven-day limitation of the referenced rule, citing *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989), Defendant noted that under its inherent supervisory power, the District Court may consider an untimely post-trial motion for judgment of acquittal or may grant such a motion sua sponte to correct manifest error when it retains jurisdiction over the

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[2] Rule 29(c) of the Federal Rules of Criminal Procedure provides in applicable part: If the jury returns a verdict of guilty . . . a motion for judgment of acquittal may be made or renewed within seven days after the jury is discharged or within such further time as the Court may fix during this seven-day period. If a verdict of guilty is returned the Court may, on such motion, set aside a verdict and enter judgment of acquittal.

case. *Id. See also United States v. Coleman*, 811 F.2d 804, 806-7 (3rd Cir. 1987). Defendant's motion was predicated upon this Court's holding in *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), i.e., the appeal as to Defendant's co-defendants wherein the convictions of co-defendant Becerra were reversed. Defendant's Motion for Judgment of Acquittal subsequently was denied by the District Court. Defendant timely filed his Notice of Appeal following the denial of his renewed Motion for Judgment of Acquittal and his sentencing by the District Court.

WHEREFORE Defendant respectfully urges this Court to reinstate his appeal for the reasons cited herein.

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER

By: Stewart G. Abrams
Stewart G. Abrams
Assistant
Federal Public Defender
Florida Bar No. 371076
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed this 20th day of September, 1991, to Andrew Oosterbaan, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Stewart G. Abrams
Stewart G. Abrams

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5083

(Caption Omitted In Printing)

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: KRAVITCH, HATCHETT and COX, Circuit Judges.

BY THE COURT:

Appellant's motion to reinstate his appeal is DENIED.

Appellant's motion for reconsideration of the July 19, 1991 order granting appellee's motion to dismiss is DENIED.

(Filed January 22, 1992)

SUPREME COURT OF THE UNITED STATES

No. 91-7749

Jose Antonio Ortega-Rodriquez [sic],

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 15, 1992

Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

No. 91-7749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a former fugitive from sentencing must automatically forfeit the right to appeal his conviction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-7749

JOSE ANTONIO ORTEGA-RODRIGUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The orders of the Eleventh Circuit Court of Appeals granting the government's motion to dismiss Mr. Ortega's appeal, J.A. 78, and denying his motion to reinstate appeal, J.A. 93, are not reported. The district court's order denying Mr. Ortega's renewed motion for judgment of acquittal, J.A. 18, is not reported. The opinion of the United States Court of Appeals for the Eleventh Circuit which reversed the convictions of co-defendant Becerra-Flores and affirmed the convictions as to co-defendant Mieres-Borges is reported as *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1633 (1991). J.A. 17.

JURISDICTION

The judgments of the court of appeals were rendered on July 19, 1991 and January 22, 1992. The petition for writ of certiorari was filed on March 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Title 28 U.S.C. §§ 2072(a) and (b) provide:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

A jury convicted Jose Antonio Ortega-Rodriguez ("Petitioner") and Osvaldo Becerra-Flores ("co-defendant") of conspiracy and possession with intent to distribute cocaine, in violation of 46 U.S.C. Appendix §§ 1903(a), (g), (j) and 18 U.S.C. § 2. R. 61, 62. The evidence against them was virtually identical, except for one

item of evidence, a boat registration, which was admitted against co-defendant Becerra-Flores only. T. 202. Petitioner fled before sentencing and was sentenced *in absentia* to imprisonment for 19 years, 7 months. R. 81. His identically-situated co-defendant did not flee; he was sentenced and appealed to the United States Court of Appeals for the Eleventh Circuit, which reversed his conviction based upon insufficiency of evidence. *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1633 (1991).[1] J.A. 17, 64.

Petitioner was a fugitive for 11 months, all before he filed a notice of appeal. R. 121. Upon his capture, the district court granted a motion to vacate Petitioner's sentence, J.A. 3, and entertained a renewed post-trial motion for judgment of acquittal, based upon the *Mieres-Borges* decision. J.A. 11. The motion was denied, J.A. 46, and Petitioner was sentenced to imprisonment for 15 years, 8 months. J.A. 51. Petitioner filed a timely notice of appeal from the newly entered Judgment and Commitment. R. 121.

Petitioner was indicted for, convicted of, and separately sentenced to a consecutive term of 21 months imprisonment for contempt of court and failure to appear for sentencing. J.A. 7, 58.

After Petitioner filed a brief in support of his appeal of the original drug charges, the government moved to dismiss the appeal under the "well established case law" of *United States v. Holmes*, 680 F.2d 1372 (11th Cir.

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[1] The trial also included a third defendant, Roberto Mieres-Borges, but his case is substantially different from that of Petitioner and co-defendant Becerra-Flores. Mr. Mieres-Borges made a damaging statement which the jury considered in a separate phase of a bifurcated trial. The verdicts against Petitioner and Becerra-Flores were returned by the jury before it considered Mieres-Borges' statement. Mieres-Borges was convicted at the conclusion of the bifurcated trial, and his conviction was affirmed on appeal in *United States v. Mieres-Borges*, 919 F.2d 652.

1982), *cert. denied*, 460 U.S. 1015 (1983), and *United States v. London*, 723 F.2d 1538 (11th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984), arguing that "appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction." J.A. 71. The government's motion did not allege any particular factors militating in favor of dismissal, arguing instead that Petitioner's pre-appeal fugitive status constituted a waiver of the right to appeal his conviction. The court of appeals granted the motion to dismiss, J.A. 78, and subsequently denied Petitioner's motion to reinstate appeal and to reconsider the order dismissing the appeal. J.A. 79-93.

The Supreme Court of the United States granted certiorari and leave for Petitioner to proceed *in forma pauperis* on June 15, 1992. J.A. 94.

SUMMARY OF ARGUMENT

This Court has declined to entertain appeals of defendants who are fugitives during the appellate process. The Court has never extended the rule to include dismissals of appeals by former fugitives who are in custody at the commencement of the appeal. This Court and nearly every court of appeals have employed a case-by-case discretionary analysis when deciding whether to dismiss or to permit an appeal by a former fugitive.

Alone in its analysis, the Eleventh Circuit requires the dismissal of the appeal of a conviction by any defendant who was at any time a fugitive from the trial or sentencing proceedings. The Eleventh Circuit's case law creates a mandatory rule of dismissal which requires that every former fugitive forfeit the appeal of his conviction regardless of the circumstances or nature of the case. The Eleventh Circuit, in violation of federal statute, rules of court, and this Court's precedent, effectively abrogates the congressionally created right to appeal.

Such blind adherence to an automatic rule of dismissal is an unauthorized intrusion into the legislative process.

In contrast, the exercise of discretion based upon the individual circumstances of each case effectuates congressional purpose, rules of court, and decisions of this Court.

The appropriate exercise of discretion should consider whether the former fugitive has obtained an unfair advantage by prejudicing either the appellate process or potential post-appellate proceedings. The court should also weigh the need to vindicate the authority of law repudiated by the fugitive's flight.

In this case, Petitioner's flight did not prejudice the appellate process. A complete record-on-appeal has been filed with the court of appeals. The Eleventh Circuit has already determined that the evidence is inadequate to sustain the conviction of Petitioner's identically-situated co-defendant. Post-appellate prejudice is nonexistent because, if the court reverses Petitioner's conviction for failure to prove essential elements of the crime charged, there will be no retrial.

Petitioner's repudiation of the district court's proceedings has been addressed and punished in a separate prosecution in which he was indicted, convicted, and sentenced to a consecutive term of imprisonment for contempt of court and failure to appear.

Petitioner has been sentenced to 17½ years imprisonment, only 21 months of which is for failure to appear and contempt of court. The balance of his sentence is for drug crimes of which he was convicted with evidence that the Eleventh Circuit has determined to be insufficient. Yet the Eleventh Circuit's precedent requires it to refuse Petitioner his congressionally mandated right to appeal the drug convictions.

When a lower court improperly limits the right of appeal in a criminal case, this Court issues a writ of certiorari to require it to consider the appeal on the merits. The Court should do so now.

ARGUMENT

Although the right to appeal a criminal conviction does not have its genesis in the Constitution, *Abney v. United* States, 431 U.S. 651, 656 (1977), it has been embodied in federal law for nearly all of this century. *Id.*; Act of Feb. 6, 1889, 25 Stat. 656; Act of Mar. 3, 1911, 36 Stat. 1133. By act of Congress, a convicted criminal defendant has a right to appeal the conviction. 28 U.S.C. § 1291; *Abney*, 431 U.S. at 656 n.3. "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right." *Coppedge v. United States*, 369 U.S. 438, 441 (1961).

To exercise the right of appeal in criminal cases, "one must come within the terms of the applicable statute—in this case, 28 U.S.C. § 1291." *Abney*, 431 U.S. at 656. The terms of section 1291 grant jurisdiction to the court of appeals to hear appeals from all final decisions of the district courts of the United States. To effect this right, a defendant must conform to the procedural requirements of an appeal, which are set forth in the Federal Rules of Appellate Procedure, including timely filing of the notice of appeal, transcript order, record on appeal and briefs. *Coppedge*, 369 U.S. at 441-42. Neither the statute nor the rules address forfeiture of the right to appeal in cases in which the procedural formalities have been satisfied.

However, the Court has declined to entertain the appeal of a criminal defendant who escaped from custody and remained a fugitive during the pendency of the appeal. *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (and cases cited therein). Although the appeal remains an adjudicable case or controversy, the Court has reasoned that a fugitive is not entitled to call upon the Court's resources to determine the merit of his claim. *Id.* at 366. This judicially engrafted exception to the statutory right of appeal authorizes the Court to decline to adjudicate the case of a fugitive from justice, while he is a fugitive from justice.

This Court has never extended the rule to require dismissal of the appeal of a *former* fugitive, who is in custody at the time of his appeal. Nearly every court of appeals subscribes to the policy that the appeals of former fugitives should be allowed or denied on a discretionary basis, considering relevant factors case-by-case. *United States v. Matista*, 932 F.2d 1055, 1057 (2nd Cir. 1991) (dismissing appeal but noting "we remain mindful 'that we have discretion to reach the merits in an appropriate case.'"); [2] *United States v. Wright*, 902 F.2d 241, 242 (3rd Cir. 1990) ("It is without question that we have the discretion to dismiss the appeal."); *United States v. Snow*, 748 F.2d 928, 930 (4th Cir. 1984) ("[T]he court has decided to exercise its discretion in favor of permitting the appeal to proceed."); *United States v. DeValle*, 894 F.2d 133, 137 (5th Cir. 1990) ("dismissal of appeal because of prior fugitive status is discretionary with the appellate court . . ."); *United States v. Dawson*, 350 F.2d 396 (6th Cir. 1965) (exercising discretion not to dismiss appeal if present fugitive surrenders and becomes a former fugitive within 30 days of appellate court's order); *Brinlee v. United States*, 483 F.2d 925 (8th Cir. 1973) (exercising discretion not to dismiss appeal if present fugitive surrenders and becomes former fugitive within 30 days of appellate court's order); *Katz v. United States*, 920 F.2d 610, 612 (9th Cir. 1990) ("we *may* dismiss an appeal of a fugitive" but refusing to do so in the case of a former fugitive) (emphasis added); *United States v. Parrish*, 887 F.2d 1107, 1109 (D.C. Cir. 1989) ("we will not exercise our discretion to allow a belated appeal of this conviction" where the defendant was a fugitive for 14 years); *cf. Dentley v. Lane*, 720 F.2d 472 (7th Cir. 1983) (exercising discretion to reinstate appeal if present fugitive becomes a former fugitive by surrendering within 30 days of dismis-

[2] *Accord United States v. Persico*, 853 F.2d 134, 137 (2nd Cir. 1988) (exercising discretion to dismiss appeal); *United States v. Baccollo*, 725 F.2d 170, 172 (2nd Cir. 1983) (declining to exercise discretion to dismiss appeal).

sal). One circuit has held that appeals should not be dismissed unless the defendant is a fugitive during the appeal. *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988).

The Eleventh Circuit Court of Appeals stands alone. It has extended *Molinaro* to an extreme by *requiring* the dismissal of any appeal of a conviction if the defendant was once a fugitive from sentencing, "unless he can demonstrate that his absence was due to matters completely beyond his control." *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982). The *Holmes* court reasoned that the mere act of becoming a fugitive[3] while awaiting sentencing is a waiver of the right to appeal the conviction. Then, using the same rationale, the Eleventh Circuit stretched *Molinaro* to require the dismissal of every appeal in which a defendant had earlier been a fugitive from any stage of the trial proceedings. *United States v. London*, 723 F.2d 1538 (11th Cir. 1984). Together, *Holmes* and *London* penalize every former fugitive by requiring forfeiture of the right to appeal the conviction.[4]

The Eleventh Circuit's mandatory penalty requires that Petitioner lose the right to appeal his conviction because he was a fugitive before the appeal was initiated. Since the Eleventh Circuit will not exercise discretion in this matter, it must dismiss Petitioner's appeal, without consideration of any other fact or circumstance of the case. Thus, in the present case, the Eleventh Circuit has failed to consider the following relevant circumstances: (a) The

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[3] As used in this argument, the term fugitive connotes a voluntary act of fleeing, removing any fugitive from the Eleventh Circuit's exception for one who is absent "due to matters beyond his control."

[4] One Eleventh Circuit judge has wondered aloud if the *Holmes* and *London* rationale could lead to forfeiture of the right of appeal if the defendant becomes a fugitive "before trial." *United States v. London*, 723 F.2d at 1540 n.1 (Johnson, J., dissenting).

present appeal seeks only to address the sufficiency of evidence to support the conviction in a case in which the court of appeals has already determined that there is insufficient evidence to convict an identically-situated co-defendant. *United States v. Mieres-Borges*, 919 F.2d at 660; (b) Neither the court nor the government can be prejudiced by allowing the present appeal addressed solely to the sufficiency of evidence. The record of proceedings has been transcribed, prepared and filed with the court of appeals. If the convictions are reversed on appeal due to insufficiency of evidence, there will be no retrial, *Burks v. United States*, 437 U.S. 1, 18 (1978), so there will be no further need for witnesses whose memories may have faded, nor for evidence which may be lost; (c) The court from which Petitioner fled has already vindicated the authority of law since Petitioner has been separately punished for becoming a fugitive. He has been indicted for, convicted of, and sentenced to a consecutive term of 21 months imprisonment for contempt of court and failure to appear.

One cannot fairly dispute that some fugitives should lose the right to appeal their conviction. But the forfeiture should not be automatic. Indeed, this Court has refused to adopt an automatic dismissal rule for fugitives. In a case in which the defendant was a fugitive while his case was pending before this Court, *United States v. Sharpe*, 470 U.S. 675 (1985), the Court rejected the idea that dismissal is an automatic consequence. *Id.* at 681-82 n.2. Even those justices who called for dismissal did so based upon the Court's "discretion" first recognized in *Smith v. United States*, 94 U.S. 97 (1876), *United States v. Sharpe*, 470 U.S. at 722 (Stevens, J., dissenting), or as a matter of the Court's "choos[ing]", *id.* at 688 (Blackmun, J., concurring), not upon some automatic rule which requires dismissal.

The right to appeal a criminal conviction was created by act of Congress, now codified at 28 U.S.C. § 1291.

Congress has authorized the Supreme Court to prescribe rules of practice and procedure for such appeals, 28 U.S.C. § 2072, but these rules are not unlimited: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In accordance with this law,[5] the Court has codified detailed rules of appellate procedure. Fed. R. App. P. 1 advisory committee's note. None of the rules causes forfeiture of the right of appeal when all other procedural requirements have been met.

One of the Court's rules grants to the courts of appeals authority to adopt their own rules, but the authority is limited. Rule 47, Federal Rules of Appellate Procedure, accords the courts of appeals limited authority "to make rules consistent with rules of practice and procedure promulgated by the Supreme Court." Fed. R. App. P. 47 advisory committee's note. The *Holmes-London* precedent of the Eleventh Circuit is not a rule of court, adopted in accordance with the rule-making power authorized by law. Moreover, this Court has not permitted judicial decisions to substitute for the rule-making process. *United States v. Robinson*, 361 U.S. 220, 229 (1960).

There is no indication that Congress intended to foreclose former fugitives from the right to appeal their convictions. Congress' most recent pronouncement on the subject is found in 18 U.S.C. § 3146, which provides the penalty for one who fails to appear in court. The law authorizes penalty by fine, consecutive imprisonment, 18 U.S.C. § 3146(b), and by forfeiture of property posted as part of an appearance bond, 18 U.S.C. § 3146(d), but that is all.

The Eleventh Circuit's precedent requiring the automatic dismissal of the appeal of a former fugitive, who

[5] The authority to prescribe rules for criminal appeals was for a long time found at 18 U.S.C. § 3771, *repealed by* Pub. L. No. 100-702, Title IV, § 404(a)(1), November 19, 1988, 102 Stat. 4561, in favor of 28 U.S.C. § 2071-2077, relating to rules of court generally.

is not a fugitive during the pendency of his appeal, abridges the substantive right of appeal created by Congress. The Eleventh Circuit's refusal to evaluate each fugitive individually, to use discretion in the dismissal of such appeals, defies the right created by Congress, in violation of 28 U.S.C. § 2072(b).

If an appellate court is to deny the right of appeal for matters which did not occur before it, then the dismissal must be the product of thoughtful discretion, based upon the facts and circumstances at hand. This is the procedure employed by the Court and all but one court of appeals. The Eleventh Circuit's blind adherence to a mandatory rule of dismissal for former fugitives from sentencing is an unauthorized limitation on the congressionally mandated right of appeal.

The proper exercise of discretion should be case-specific. A review of those decisions which have exercised discretion, *see, e.g., supra* pp. 7-8 *and infra* pp. 13-16, identifies a variety of potential issues of concern, all of which coalesce into three broad categories:

1. **Prejudice in the appellate court.** This explores the impact the fugitive has had on the court's ability to entertain a meaningful appeal. Can a proper record-on-appeal be prepared? Are the transcripts of proceedings available or can the proceedings still be transcribed?

2. **Prejudice in potential post-appellate proceedings.** These issues consider the impact the fugitive has had on post-appellate proceedings. If a retrial is ordered, are witnesses available for retrial? Are their memories intact? Is physical evidence available or has it been lost? If the defendant's appeal is unsuccessful, can the court's judgment be enforced?

3. **Need to vindicate the court's authority.** Has the court before which the defendant was a fugitive vindicated the authority of law? Has he been held in contempt? Has he been prosecuted for failure to appear?

Has he received a meaningful punishment, such as a consecutive sentence?

Upon these considerations it would be an abuse of discretion to deny Petitioner the right to appeal his conviction.

1. **No prejudicial impact in appellate court.** The sole issue in Petitioner's appeal involves the sufficiency of evidence to support the convictions.[6] The record of proceedings has been transcribed, prepared and filed with the court of appeals. The court can entertain a meaningful appeal. The court of appeals has not previously undertaken to analyze the sufficiency of evidence against Petitioner, since he was a fugitive during the appeal of his co-defendants. *See United States v. Mieres-Borges*, 919 F.2d at 654 n.1. If Petitioner had appealed with his co-defendants, the court of appeals would have had to undertake a separate sufficiency-of-evidence analysis at that time. Thus, the court of appeals will undertake the same consideration for this defendant that it would have otherwise, albeit at a later time.

2. **No prejudicial impact in potential post-appellate proceedings.** If the conviction is reversed on appeal due to insufficiency of evidence, there can be no retrial. *Burks v. United States*, 437 U.S. at 18. The government cannot be prejudiced since it will have no need to call witnesses whose memories have faded, nor to produce evidence which may be lost. If the appeal is unsuccessful, Petitioner is already in custody for the court to effect its judgment and commitment.

3. **No further need to vindicate the authority of law.** The government and district court have already vindicated the authority of law. Petitioner has been separately punished for being a fugitive. He was indicted for, convicted of, and sentenced to a consecutive term of 21

[6] *See* Brief of Appellant, filed in the Eleventh Circuit Court of Appeals, April 24, 1991.

months imprisonment for contempt of court and failure to appear.

The court of appeals dismissed Petitioner's timely appeal of his conviction under an automatic rule of dismissal, because he was a fugitive before the appeal was initiated. The court of appeals refused to exercise its discretion on a case-by-case basis. In the process, the court of appeals has improperly abrogated the congressionally mandated right of appeal. If the court of appeals had exercised discretion in deciding whether to dismiss this appeal, it would have been an abuse of discretion to grant dismissal.

The government would defend the Eleventh Circuit's *Holmes-London* precedent, and the dismissal of Petitioner's appeal, by claiming reliance upon *Molinaro v. New Jersey*, 396 U.S. 365; *Eisler v. United States*, 338 U.S. 189 (1949); *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Smith v. United States*, 94 U.S. 97; *Estelle v. Dorrough*, 420 U.S. 534 (1975); and *Allen v. Georgia*, 166 U.S. 138, 142 (1897).[7] Upon close scrutiny, these decisions are not helpful to the government, but are supportive of Petitioner's contention. First, each of the decisions involved a defendant whose appeal was dismissed because he was a fugitive *during* a pending appeal. Second, none of the decisions require automatic dismissal of the appeal of a former fugitive; instead they *allow* dismissal in appropriate cases, based upon the facts of the case and the statutory scheme of the jurisdiction. Third, to the extent a fugitive defendant is returned to custody, each of the decisions acknowledges the discretion of the respective courts and legislative schemes to allow an appeal by a former fugitive.

Unlike the present Petitioner, Molinaro was a fugitive at the time of his appeal in this Court. It follows that the Court would find him "disentitle[d]" to call upon the

[7] Brief of the United States, filed herein May 1992.

Court's resources to determine his claim. *Molinaro v. New Jersey*, 396 U.S. at 366. The Court's holding includes a significant choice of words: "Under these *circumstances* we *decline* to adjudicate his case." *Id.* at 365 (emphasis added). The Court's words express a case-specific discretionary decision, not an automatic or mandatory rule of dismissal.

In *Eisler v. United States*, 338 U.S. at 190, a majority of the Court removed the petitioner's case from the docket until further order because he was then a fugitive. However, the Court refused to hold that the fugitive status automatically deprived the Court of jurisdiction. *Id.* (Vinson, C.J. and Frankfurter, J., dissenting). Instead the Court exercised its discretion based upon the circumstances of the case. *See id.* at 194 (Murphy, J., dissenting).

Similarly, in *Bonahan v. Nebraska*, 125 U.S. 692, the Court removed from the docket the case of a present fugitive, "unless the plaintiff in error is brought or comes before the court below on or before the last day of this term . . ." The Court exercised its discretion not to dismiss automatically, offering an option for the fugitive to return before the term of court expired.

In *Smith v. United States*, 94 U.S. at 97, the Court stated, "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."

Molinaro, *Eisler*, *Bonahan* and *Smith* each involve a discretionary decision to withhold further consideration of the appeals of present fugitives. In none of these cases did the Court hold that dismissal is automatic or that dismissal is appropriate for former fugitives who were not at large during the pending appeal.

In *Allen v. Georgia*, 166 U.S. 138, the defendant had escaped after his conviction and sentence and remained

a fugitive during his writ of error to the Georgia Supreme Court. The Georgia court ordered that it would dismiss the proceeding unless the defendant surrendered or was recaptured within 60 days. Since the defendant remained a fugitive after the expiration of 60 days, his writ of error was dismissed. *Id.* at 139. When Allen was eventually recaptured the next year, after the expiration of the term of court, he was resentenced and sought a writ of error from the United States Supreme Court, this time challenging the Georgia Supreme Court's dismissal of his original writ of error. This Court found no denial of due process under the Federal Constitution and determined that the dismissal was consonant with the state law of Georgia.

The result in *Allen* is entirely consistent with the present Petitioner's argument before this Court. First, unlike Petitioner, Allen was a fugitive during the appeal and at the time his appeal was dismissed. It is reasonable for a court to dismiss the appeal of a party who will not submit to the court's jurisdiction at the time the claim is being made. Second, unlike Petitioner, Allen could not file a timely appeal since the law of Georgia would not permit an appeal after the term of court expired. *Id.* at 142. Third, this Court acknowledged that dismissal was not an automatic consequence, even though Allen had been a fugitive during his appeal: "Whether the court should give the plaintiff sixty days, or until the last day of the term, to appear and surrender himself to custody, was a matter for the court to determine . . ." *Id.* By this observation, the Court recognized that even a defendant who was a fugitive during his appeal does not automatically forfeit his appeal if he surrenders before the appeal is dismissed.

Finally, the government relies upon *Estelle v. Dorrough*, 420 U.S. 534, in which the Court explored the statutory scheme of appeals in Texas. By statute, the Texas Court of Criminal Appeals is deprived of juris-

diction "[i]f the defendant pending an appeal in a felony case[] makes his escape from custody." *Id.* at 535 n.1. "[T]he escape divests the court of jurisdiction with later dismissal being a mere formality." *Id.* However, the statute allows the court in its discretion to reinstate the appeals of former fugitives who are returned to custody within a set time limit. This discretion had been exercised to both grant and deny reinstatement of appeals in Texas. *Id.* at 539 n.8. The statute does not apply to defendants who flee pre-appeal but are recaptured in time to file a timely appeal. *Id.* at 539. This Court upheld the Texas statute against an equal protection challenge, as a rational exercise of state legislative judgment. *Id.* at 538 n.7.

Dorrough differs from the present case in three ways. First the *Dorrough* Court was considering a different statutory scheme. A Texas statute grants the right of appeal, but extinguishes jurisdiction if the defendant becomes a fugitive during a "pending appeal." Under federal law, Congress has created a right of appeal, but has not limited the right in the case of a fugitive. *See supra* pp. 6-12. Second, Dorrough was a fugitive *during* his appeal; Petitioner was not. Third, the *Dorrough* decision acknowledges the court's discretion to allow the appeal of a former fugitive; the *Holmes-London* precedent of the Eleventh Circuit causes automatic waiver of the right to appeal a conviction.

In short, the government defends the Eleventh Circuit's rule of automatic, mandatory dismissal with six decisions, all of which are inconsistent with that rule.

It is ironic. The question of whether Petitioner should be denied the right to appeal his conviction is based entirely upon legitimate concerns for the proper administration of justice. Yet, if Petitioner's appeal is correct, his conviction on legally insufficient evidence is a result of a breakdown in the administration of justice. His insufficiency-of-evidence contention is not merely an argument in the abstract; the court of appeals has already released his identically-situated co-defendant for this very reason. *See United States v. Mieres-Borges*, 919 F.2d at 660. If Petitioner is legally not guilty of the drug crimes, his only crime—being a fugitive—will be punished by imprisonment for 17-1/2 years, well in excess of the maximum authorized by Congress, 18 U.S.C. § 3146, and over seven-fold longer than the applicable guideline sentence for failure to appear. United States Sentencing Commission, *Guidelines Manual*, § 2J1.6.

When lower courts improperly limit the right of appeal in a criminal case, this Court issues a writ of certiorari to the court of appeals to require it to consider the appeal on its merits. *Coppedge*, 369 U.S. at 437; *cf. Lozada v. Deeds*, 111 S.Ct. 860, 862 (1991). The Court should do so now.

CONCLUSION

A writ of certiorari should issue to the court of appeals, directing it to consider the merits of Petitioner's appeal of his conviction.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court of appeals may dismiss an appeal by a convicted defendant who fled following his conviction but was recaptured and returned to custody 11 months later.

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In the Supreme Court of the United States

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JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The orders of the court of appeals granting the government's motion to dismiss petitioner's appeal (J.A. 78) and denying petitioner's motion to reinstate the appeal (J.A. 93) are unreported.

JURISDICTION

The order of the court of appeals granting the government's motion to dismiss petitioner's appeal (J.A. 78) was entered on July 19, 1991, and the order denying petitioner's motion to reinstate the appeal (J.A. 93) was entered on January 22, 1992. The petition for a writ of certiorari was filed on March 17, 1992, and was granted on June 15, 1992. J.A. 94. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rule 47 of the Federal Rules of Appellate Procedure provides:

> Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession with intent to distribute cocaine while on board a vessel of the United States, in violation of 46 U.S.C. App. 1903(a), and conspiracy to commit that offense, in violation of 46 U.S.C. App. 1903(j). J.A. 68. Petitioner fled before sentencing and was sentenced *in absentia*. He was recaptured 11 months later and resentenced. J.A. 80. The court of appeals dismissed the appeal petitioner took from that judgment. J.A. 78.

1. The evidence at trial showed that, on November 7, 1988, the Customs Service received reports of a possible air drop of narcotics in the Cay Sal Bank area of the Bahamas, located south of the Florida Keys and north of Cuba. At dusk that evening, a Customs pilot flying in the area saw a plane circling a boat at low altitude. The plane dropped 20 bales into the water, which were picked up by the boat. When the plane left the area, the Customs pilot followed it to Cuban airspace before abandoning pursuit. The Customs pilot was unable to locate the boat when he flew back over the area of the air drop 40 minutes later. J.A. 19-20.

The following morning, the pilot of a second Customs aircraft, launched to search for the boat near Cay Sal, spotted a vessel, the *Wilfred* from Miami, Florida, that appeared to fit the first pilot's description. The pilot observed the *Wilfred* traveling away from the island toward Cuba with a cover over the back of the boat that hid its name. When the pilot flew over Cay Sal, he saw numerous bales wrapped in white plastic and stacked above the high water mark on the beach. He also saw footprints on the beach between the stacked bales and the water line near where he had originally sighted the *Wilfred*. J.A. 20-21.

The pilot radioed the Coast Guard, requesting that the *Wilfred* be intercepted. The Coast Guard contacted the *Wilfred* by radio and asked a series of standard pre-boarding questions. After responding three times that the *Wilfred*'s last port of call was

Cayo Blanco, the captain of the *Wilfred* changed his answer and stated that he had departed from Key Largo, Florida. He also stated that the *Wilfred* was heading back to Key Largo and that the purpose of the voyage had been fishing. The Coast Guard boarded the *Wilfred*, but a full inspection revealed no contraband. Eventually, petitioner and the two other persons on board the vessel, Roberto Mieres-Borges and Osvaldo Becerra-Flores, were arrested. J.A. 18-19, 22-23. Law enforcement agents later recovered several bales containing cocaine from the beach site on Cay Sal. J.A. 28-29.

2. The jury convicted petitioner and his two co-defendants on March 24, 1989. Sentencing was set for June 15, 1989, but petitioner failed to appear at that time. He was sentenced *in absentia* to 235 months' imprisonment, to be followed by five years of supervised release. J.A. 54, 68. No appeal was taken from that judgment.

The district court issued a warrant for petitioner's arrest, and 11 months later, on May 24, 1990, petitioner was arrested and remanded to custody. See J.A. 68-69. The district court subsequently granted petitioner's motion to vacate his sentence so that he could be resentenced in person. J.A. 10.

While petitioner was a fugitive, his two co-defendants appealed their convictions. The Eleventh Circuit affirmed Mieres-Borges's conviction, but it held the evidence insufficient to sustain Becerra-Flores's conviction. See *United States* v. *Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990); J.A. 17-45. Relying on that decision, petitioner moved in the district court, after his recapture, for a judgment of acquittal. The district court denied that motion and resentenced petitioner. On January 11, 1991, the court imposed a

sentence of 188 months' imprisonment, to be followed by a five-year term of supervised release. J.A. 46-50, 51-56.[1]

3. Petitioner noticed an appeal from that judgment.[2] J.A. 57. Relying on *United States* v. *Holmes*, 680 F.2d 1372 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), and *United States* v. *London*, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228 (1984), the government moved to dismiss the appeal on the ground that petitioner had waived his right to appeal from his narcotics convictions when he fled after conviction and before sentencing, and remained at large for the next 11 months. J.A. 66-71. On July 19, 1991, the court of appeals issued an order granting the motion to dismiss the appeal. J.A. 78. Following further briefing, J.A. 79-92, the court denied petitioner's motion to reinstate the appeal. J.A. 93.

SUMMARY OF ARGUMENT

A. Courts of appeals have long enjoyed authority to enforce procedural rules establishing reasonable conditions on the exercise of their appellate jurisdic-

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[1] Petitioner was subsequently convicted of contempt of court, in violation of 18 U.S.C. 401(3), and failure to appear for his original sentencing, in violation of 18 U.S.C. 3146. He was sentenced to 21 months' imprisonment on those charges, to be served consecutively to his 188-month sentence on the narcotics charges. J.A. 58-60.

[2] Petitioner filed his notice of appeal on January 28, 1991. J.A. 81. Because the judgment was entered on the criminal docket on January 23, 1991, and because the 10-day time limit for filing an appeal under Fed. R. App. P. 4(b) runs from the date of the "entry of" the judgment on the docket, rather than from the date the order is signed or filed with the clerk, petitioner's appeal was timely.

tion. Those rules have traditionally authorized courts to dismiss the appeals of defendants who have become fugitives after trial. Rules providing for dismissal of fugitives' appeals are within the supervisory authority of the courts of appeals as long as they are (1) not inconsistent with the Constitution or a statute, (2) within the authority of courts to establish through adjudication, and (3) reasonable in light of the interests they seek to promote.

Rules requiring dismissal of the appeals of defendants who have absconded before disposition of their appeals satisfy each of those conditions. Fugitive-dismissal rules are not inconsistent with either the Constitution, which does not grant a right of appeal at all, or the statute governing appeals from final judgments in criminal cases, which does not bar the courts from conditioning the exercise of appellate jurisdiction on compliance with reasonable procedural rules. Such rules are also within the authority of courts of appeals to act through adjudication to "regulate their practice in any manner not inconsistent with" the Federal Rules of Appellate Procedure. Fed. R. App. P. 47. Finally, fugitive-dismissal rules are reasonable, because they promote the interests in orderly procedure, discourage escapes and encourage voluntary surrenders, and reflect a determination not to extend the benefits of appellate review to persons who have displayed contempt for the courts' authority by fleeing. Those justifications apply equally to fugitives who remain at large throughout the appellate process and to those who are captured prior to the order of dismissal.

B. The same rationale underlies the courts' authority to dismiss appeals by defendants such as petitioner, who became a fugitive after he was convicted but before he filed a notice of appeal. Flight

by a convicted defendant is equally disruptive whether it occurs before or after filing a notice of appeal, and the interests in discouraging flight and refusing to extend the benefit of an appeal to those who exhibit contempt for the system are equally applicable regardless of whether a notice of appeal has been filed. In this case, it is particularly hard to justify treating pre-appeal flight differently from post-appeal flight, since petitioner was sentenced *in absentia*, and if his counsel had filed a notice of appeal on his behalf from his initial sentence, it would have been indisputably proper for the court of appeals to dismiss his appeal. It was only petitioner's failure to file a notice of appeal following the original sentencing, and the district court's willingness to resentence him after his recapture, that has enabled petitioner to characterize the period of his fugitivity as part of the "pre-appeal" period. In all pertinent respects, the 11-month post-trial period during which petitioner was a fugitive is equivalent to the "post-appeal" period, and it was reasonable for the court of appeals to treat petitioner's case in the same way it would have if petitioner had already filed his notice of appeal.

The Eleventh Circuit's fugitive-dismissal rule is not invalid on the ground that, as petitioner complains, it is unduly rigid. In this case, as in the two prior published decisions in which the Eleventh Circuit has dismissed appeals by defendants who became fugitives before filing their notices of appeal, the defendant remained a fugitive for a lengthy period of time and did not return to custody voluntarily, but was captured. It is not unreasonable for a court to dismiss appeals in cases in which the appeal would have been pending (and perhaps disposed of) but for the defendant's flight, particularly where the

defendant does not voluntarily surrender, but returns to the jurisdiction of the court only because the government is able to defeat his effort to remain at large. It is entirely possible that the Eleventh Circuit would not dismiss the appeal of a defendant who became a fugitive for only a short period and voluntarily returned at a time that had no effect on the disposition of the case in the court of appeals. But regardless of how the court would dispose of such a case, petitioner cannot prevail on the ground that the court's dismissal rule may be subject to unreasonable application in some other, hypothetical case.

ARGUMENT

A COURT OF APPEALS MAY DISMISS THE APPEAL OF A DEFENDANT WHO FLEES AFTER CONVICTION AND IS RECAPTURED PRIOR TO SENTENCING AND APPEAL

A. The Courts Of Appeals May Make Rules Providing For The Dismissal Of Appeals By Fugitive Defendants Even After Their Return

This Court has held that, absent a conflict with the Constitution or a statute, a court of appeals may exercise its supervisory authority to devise "procedural rules governing the management of litigation." *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985). Thus, courts may make rules requiring an appellant, as a condition of maintaining his appeal, to file a timely notice of appeal (see Fed. R. App. P. 4), to file a brief in a timely fashion (see Fed. R. App. P. 31), or to comply with rules governing the processing of the appeal (see, *e.g.*, 11th Cir. R. 42-1). See generally *Coppedge* v. *United States*, 369 U.S. 438, 441-444 (1962).

The courts of appeals do not need specific statutory authorization to make such rules. Rather, the courts can mandate procedures that are "deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Thomas* v. *Arn*, 474 U.S. at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). Failure to abide by those procedural rules can result in waiver of the statutory right to appeal. See *Thomas* v. *Arn*, 474 U.S. at 147 ("Had petitioner failed to comply with a scheduling order or pay a filing fee established by a court of appeals, that court could certainly dismiss the appeal."); see also *Link* v. *Wabash R. R.*, 370 U.S. 626 (1962).

A rule authorizing a court to dismiss the appeals of fugitive defendants is within the supervisory power of a court of appeals if it satisfies three criteria: (1) it must not conflict with the Constitution or any statute; (2) it must be the kind of rule that can properly be established through adjudication; and (3) it must be reasonable in light of the concerns that it is designed to address. See *Thomas* v. *Arn*, 474 U.S. at 145-148. The rule applied by the court of appeals in this case satisfies each of those requirements.

1. *The Court of Appeals' Rule Does Not Conflict With Any Constitutional Or Statutory Provision*

A rule permitting dismissal of the appeal of a defendant who has become a fugitive does not conflict with the Constitution or any statute. It is well settled that a convicted criminal has no constitutional right to appeal. *Abney* v. *United States*, 431 U.S. 651, 656 (1977); see also *McKane* v. *Durston*, 153 U.S. 684,

687-688 (1894); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956). The right to appeal is "purely a creature of statute." *Abney* v. *United States*, 431 U.S. at 656; see *United States* v. *Parrish*, 887 F.2d 1107, 1108 (D.C. Cir. 1989). Nor does the denial of appeal rights to fugitives deprive a fugitive defendant of the equal protection of the laws. See *Estelle* v. *Dorrough*, 420 U.S. 534 (1975) (per curiam).

Likewise, there is no inconsistency between a rule providing for dismissal of a fugitive's appeal and any statute governing appeals in criminal cases. The statute giving criminal defendants the right to appeal from final judgments against them is 28 U.S.C. 1291. That statute confers jurisdiction on courts of appeals "from all final decisions of the district courts of the United States." The statute, however, does not set forth the procedural requirements for perfecting an appeal. Those requirements are established by rules of court—principally, the Federal Rules of Appellate Procedure and the local rules of the courts of appeals. Those procedural rules, as supplemented by rules established by the courts through adjudication, merely establish conditions on the exercise of the statutory right to appeal. They are not inconsistent with the grant of appellate jurisdiction in Section 1291. See *Thomas* v. *Arn*, 474 U.S. at 146-147.

2. *The Court of Appeals Properly Addressed the Issue of Fugitive Appeals Through Adjudication*

In 1982, the Eleventh Circuit established the dismissal rule applied in this case. The court announced the rule in *United States* v. *Holmes*, 680 F.2d 1372 (1982), cert. denied, 460 U.S. 1015 (1983). There,

the court dismissed the appeal of a defendant who became a fugitive for two years after his conviction but before sentencing. Besides challenging the reasonableness of that rule, petitioner argues (Br. 10) that it was improper for the court of appeals to establish a fugitive-dismissal rule through adjudication. He contends that courts of appeals may exercise their authority to formulate procedural rules of litigation management only "in accordance with the [formal] rule-making power," not in the course of litigation. Pet. Br. 10.

That argument ignores the broad rulemaking authority that courts of appeals are granted, as well as the long tradition of establishing fugitive-dismissal rules through adjudication. Rule 47 of the Federal Rules of Appellate Procedure provides that "[i]n all cases not provided for" by formal rules that have been promulgated by a vote of the circuit judges, "the courts of appeals may regulate their practice in any manner not inconsistent with" the federal rules of procedure in general. Thus, Rule 47 broadly permits a court of appeals to establish procedural rules through adjudication, as well as through legislative rulemaking.

That broad grant of authority is consistent with this Court's analysis in *Thomas* v. *Arn*, *supra*. The Sixth Circuit's rule conditioning an appeal on a party's objection to a magistrate's recommendation, which was at issue in *Thomas*, was established through adjudication. This Court upheld the rule and the dismissal sanction as an appropriate exercise of the court of appeals' supervisory power. The fugitive-dismissal rule, which also involves a dismissal sanction for failure to follow litigation rules, is an equally appropriate subject for adjudicative rulemaking.

Although petitioner challenges the court of appeals' authority to fashion the rule applied in this case, he does not question the authority of this Court or the courts of appeals to adopt by adjudication a rule of discretionary dismissal of appeals brought by persons who are fugitives at the time the motion to dismiss is filed. Such rules have been created through adjudication and applied by this Court and the courts of appeals for years. Indeed, petitioner endorses the cases establishing those rules. See Pet. 7. Yet there is no difference in the source of authority to make those rules and the rule at issue in this case; the only difference between the two cases is that the rule in this case would apply to defendants who are recaptured before filing a notice of appeal.[3] Thus, the question for decision in this case reduces to whether it is reasonable for a court of appeals to extend the fugitive-dismissal rule to a case such as this one.

[3] In challenging the court of appeals' authority to make rules through adjudication regarding the dismissal of a former fugitive's appeal, petitioner relies on this Court's decision in *United States* v. *Robinson*, 361 U.S. 220, 229 (1960). That decision, however, does not help petitioner. *Robinson* held only that, because the Federal Rules of Criminal Procedure explicitly prohibited enlargement of the 10-day period for taking an appeal, a district court could not exercise its general authority to extend a filing deadline for "excusable neglect" by allowing an appeal out of time. In this case, there is no explicit conflict between the courts of appeals' exercise of their supervisory authority to dismiss former fugitives' appeals and any federal rule or statute.

3. *A Rule Authorizing Dismissal of a Fugitive's Appeal Serves Valid Interests Even If The Defendant Is Not at Large at the Time of the Dismissal*

This Court has already established that an appellate court may dismiss an appeal by a defendant who becomes a fugitive during the pendency of the appeal. In *Smith* v. *United States*, 94 U.S. 97 (1876), the defendant absconded after appealing from the judgment of a state supreme court, but prior to resolution of the appeal. The Court stated that "[i]t is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." *Id.* at 97. The Court ordered the defendant's appeal to be dismissed unless he "submit[s] himself to the jurisdiction of the court below on or before the first day of our next term." *Id.* at 98. See also *Bonahan* v. *Nebraska*, 125 U.S. 692, 692 (1887) (ordering dismissal of appeal of a fugitive defendant "unless the plaintiff in error is brought or comes within the jurisdiction and under the control of the court below on or before the last day of this term"); *Eisler* v. *United States*, 338 U.S. 189 (1949) (per curiam) (applying *Smith* and *Bonahan* to remove from the Court's docket the case of a foreigner who fled the country after the Court granted his petition for a writ of certiorari).

More recently, in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam), the Court declined to adjudicate the case of a defendant who fled after appealing his state conviction. The Court stated:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who

> has sought review escapes from the restraints placed upon him pursuant to the conviction.

Id. at 366. The Court noted that the escape did not render the appeal moot. Rather, it "disentitle[d] the defendant to call upon the resources of the Court for determination of his claims." The Court went on to conclude, in light of the *Smith* and *Bonahan* decisions, that "[i]n the absence of specific provision to the contrary in the statute under which Molinaro appeals, 28 U.S.C. § 1257(2)," the Court had authority to dismiss the appeal. 396 U.S. at 366.

While the Court in *Molinaro* applied the principle of *Smith* and *Bonahan*, it broadened the rule announced in those cases: the Court did not make the dismissal contingent on the defendant's failure to return to custody by a certain date, nor did it indicate that the appeal would be reinstated under those circumstances. Rather, the Court made clear that an appellate court could respond to a defendant's flight during the pendency of an appeal by an immediate, unconditional dismissal of the appeal with prejudice, without regard to whether the defendant voluntarily returned or was recaptured. See, *e.g.*, *United States* v. *Shelton*, 508 F.2d 797, 798 (5th Cir.) (In *Molinaro*, the Supreme Court "unconditionally dismissed the appeal of a fugitive without waiting to see if he might return or be captured."), cert. denied, 423 U.S. 828 (1975); see also *United States* v. *Amado*, 754 F.2d 31, 32 (1st Cir. 1985) (noting that *Molinaro* leaves "no doubt of our authority to dismiss the appeal [of a fugitive] with prejudice").

Although the Court has not directly resolved the question whether a federal appellate court can dismiss an appeal even if the defendant is no longer at

large at the time of the dismissal, it has upheld state court orders declining to review convictions of escaped defendants even after they have been returned to custody. For example, in *Allen* v. *Georgia*, 166 U.S. 138, 142 (1897), the Court ruled that, after a fugitive defendant is recaptured, a state appellate court is under no obligation to reinstate an appeal that was dismissed while he was at large. And in *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975) (per curiam), the Court upheld the Texas Court of Criminal Appeals' dismissal, pursuant to a state statute, of an appeal brought by a defendant who fled after appealing but was recaptured before the appellate court acted to dismiss his appeal. 420 U.S. at 534-536. The Court explained the rationale underlying the state statute that mandated dismissal even though the defendant had been returned to custody: it "discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the Texas Court of Criminal Appeals." *Id.* at 537 (footnote omitted).

In these cases—and lower court cases that have applied these rulings to defendants who have absconded and been recaptured at various stages in the course of judicial proceedings—the courts have advanced a number of grounds for permitting appellate courts to exercise their authority to dismiss the appeals of fugitive defendants. First, with respect to a defendant who is still a fugitive at the time of the dismissal order, the courts have noted that an appellate court need not devote its limited resources to entertaining the appeal of a defendant against whom the court is unable to enforce an adverse judgment because he remains at large. See *Smith* v. *United*

States, 94 U.S. at 97. By consenting to hear an appeal under those circumstances, a court undermines its authority by allowing the absent defendant to "dictate the terms upon which he will consent to surrender himself to its custody." *Allen* v. *Georgia*, 166 U.S. at 141.

As suggested by the Court's holding in *Dorrough* (in which the Court upheld a state court's dismissal of a fugitive's appeal following his return), concern for enforcing adverse judgments is not the only or even the primary justification for a rule authorizing dismissal of fugitives' appeals. Rather, dismissal of an appeal is recognized as an appropriate response to the defiance and contempt for the judicial system shown by a defendant who absconds during the course of the proceedings. See *Allen* v. *Georgia*, 166 U.S. at 141 (the defendant's escape is a "contempt of [the court's] authority, to which no court is bound to submit"); see also *United States* v. *Holmes*, 680 F.2d at 1374; *United States* v. *DeValle*, 894 F.2d 133, 138 (5th Cir. 1990); *United States* v. *Wright*, 902 F.2d 241, 242 (3d Cir. 1990).

Significantly, appellate courts have invoked their authority to respond to defiance of the judicial system in justifying the dismissal of appeals by defendants even after they have been returned to custody. For example, in *United States* v. *Holmes*, *supra*, the court dismissed the appeal of a former fugitive who was recaptured two years after his conviction; following his arrest, he was sentenced and then took an appeal. The court explained that it "would fly in the face of common sense and sound reason" to allow former fugitives "to seek relief from the very legal system they previously had seen fit only to defy." 680 F.2d at 1374. In *United States* v. *Puzzanghera*, 820

F.2d 25 (1st Cir.), cert. denied, 484 U.S. 900 (1987), the First Circuit applied the *Molinaro* rule to a defendant who fled and was recaptured while his appeal was pending. In dismissing the appeal even though the defendant was back in custody, the court stated that "[i]n escaping, appellant has demonstrated his contempt for the justice system of which the appellate court is one part." The court further explained that "[m]erely because—no thanks to him—he is recaptured, it is not evident that he regains the right to review that he earlier forfeited." *Id.* at 26. The court noted that, "[h]ad his own plans not gone awry, he would still be at large; that he was recaptured does not redound to his credit." *Id.* at 27.

Finally, the courts have recognized that dismissal of an appeal is justified because the defendant's flight can have adverse effects on the administration of justice, resulting in delay and disruption at all stages of the judicial process. See *Estelle* v. *Dorrough*, 420 U.S. at 537 (rule of dismissal "discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation" of the appellate court) (footnote omitted); see also *United States* v. *Persico*, 853 F.2d 134, 137 (2d Cir. 1988). As a general matter, "[e]scape, pursuit, and recapture not only put the government and the taxpayers to considerable expense, they often put a reviewing court to additional trouble * * * by diverting its attention from the merits of the appeal and involving it in a flurry of extraneous matters." *Puzzanghera*, 820 F.2d at 26.

As this case illustrates, the delay caused by a defendant's flight can result in the disruption of the appellate process and duplication of effort. Those effects are felt regardless of whether the defendant

is ultimately recaptured. Here, petitioner's flight resulted in what amounted to a forced severance of his case from that of his co-defendants, both for sentencing and for appeal. The needless and wasteful duplication of effort required to entertain separately the appeals of co-defendants in such cases disrupts the appellate process. *United States* v. *Matista*, 932 F.2d 1055, 1058 (2d Cir. 1991) (allowing a former fugitive's appeal to go forward separately from his co-defendants' appeals would disrupt the appellate process by encouraging "piecemeal appeals.") The delay occasioned by a fugitive's flight can have significant adverse effects on the trial court as well. If the appeal could result in a retrial, the government could be severely prejudiced by the delay; indeed, the defendant could receive the windfall of release without trial if the loss of documents or unavailability of witnesses as a result of the passage of time effectively foreclosed reprosecution. See *United States* v. *Persico*, 853 F.2d at 138. And if a new trial is ordered for all or several of the defendants, one defendant's fugitive status could mean that the district court would have to conduct multiple retrials.

In sum, it is a reasonable exercise of the supervisory power for a court to fashion an adjudicative rule authorizing it to dismiss the appeals of fugitive criminal defendants, regardless of whether the defendants are subject to the court's jurisdiction at the time the court acts on the motion to dismiss. If that is so, the only remaining question is whether that reasonable rule becomes unreasonable when it is applied to a defendant who flees after his conviction, but before he is sentenced and files his notice of appeal.

B. A Court of Appeals May Apply The Fugitive-Dismissal Rule To Defendants Who Flee After Conviction But Before Filing A Notice Of Appeal

1. The Same Policies That Support the General Rule Authorizing the Dismissal of Fugitives' Appeals Support the Dismissal of the Appeal in This Case

Many of the justifications advanced by this Court and others for permitting appellate courts to dismiss fugitives' appeals apply with full force when the defendant, as in this case, flees after conviction and is returned to custody before he is sentenced and files a notice of appeal. Therefore, it is not unreasonable for a court of appeals to apply the fugitive-dismissal rule to former fugitives who flee after conviction, even if they are captured before they formally initiate proceedings in an appellate court.

This Court has not directly addressed this issue, but the Court's decision in *Estelle* v. *Dorrough*, *supra*, is instructive on the point. The Texas statute at issue in *Dorrough* applied only to post-appeal flight. The Court explained that the different treatment accorded to pre-appeal and post-appeal flight under the statute was rational, because most defendants who fled prior to appeal would be precluded from appealing by their inability to meet appellate filing deadlines. The Court added that Texas was "free to deal more severely with those who simultaneously invoked the appellate process and escaped from its custody than with those who first escaped from its custody, returned, and then invoked the appellate process within the time permitted by law." 420 U.S. at 541. In upholding, against an equal protection challenge, the distinction drawn by the state legislature, however, the Court did not in any way suggest that dismissal of the appeal of a defendant who escaped prior to filing an appeal

would be inappropriate, unconstitutional, or inconsistent with the policies underlying the Court's precedents in this area. To the contrary, the clear implication of the Court's analysis was that a state statute would be valid if it provided for dismissal of appeals not only by defendants who absconded after filing a notice of appeal, but also by those who absconded before doing so.[4]

Considerations that the courts have recognized as supporting the dismissal of fugitives' appeals will often apply to a defendant who flees and is returned to custody before his appeal is filed. Like a defendant who flees after appealing and remains at large, a defendant who flees prior to sentencing proclaims his unwillingness to submit to the orderly workings of the judicial process. The defendant's defiance of the legal system is not rendered less serious by his involuntary apprehension. On the contrary, a fugitive who is returned to custody against his will should not be allowed to "seek relief from the very legal system that [he] previously had seen fit only to

[4] Ironically, the court of appeals in *Dorrough* struck down the Texas statute on equal protection grounds because the statute distinguished between defendants who fled before filing a notice of appeal and those who fled after filing a notice of appeal. In the court of appeals' view, it was irrational to distinguish between those two classes of cases. See *Dorrough* v. *Estelle*, 497 F.2d 1007, 1012 (5th Cir. 1974); *Estelle* v. *Dorrough*, 420 U.S. at 539, 540. If the defendant had prevailed on that contention in this Court, presumably the court of appeals' rule in this case not only would be permissible, but would be a constitutionally mandated extension of the principles of *Molinaro*. As it is, the Court held that it was not irrational for the state legislature to distinguish between the two classes of cases, but it certainly did not suggest that it would be unreasonable to treat the two classes of cases similarly.

defy." *United States* v. *Holmes*, 680 F.2d at 1374. Had such a defendant eluded recapture and remained at large, he could not have maintained an appeal. It is illogical to "reward" him for his recapture by revesting in him a right he lost when he opted for flight. See *United States* v. *Puzzanghera*, 820 F.2d at 27 (fugitive returned to custody during pendency of appeal should not be "handed back his forfeited right of appellate review," because his recapture should "not redound to his credit"); *United States* v. *Persico*, 853 F.2d at 137 (fugitive who is forcefully apprehended "deserves no credit for the recapture that brings him back before the court"); *United States* v. *Parrish*, 887 F.2d at 1108 (same).

Likewise, a defendant's flight may have a significant adverse effect on the administration of justice at both the appellate and the trial level, even if the defendant is recaptured before an appeal is filed in his case. In a case such as this, where petitioner remained a fugitive while his co-defendants' appeals were being processed, his flight imposed exactly the same burden of duplication on the court of appeals that it would have if he had filed his notice of appeal before absconding. And the potential for prejudice, expense, and inconvenience at the trial level is just as great in a case like this as in a case in which the defendant escapes after the appeal has been noted. The trial court might be forced to entertain the defendant's post-conviction motions after considerable delay. And where an appeal might lead to a retrial, the prosecution would be equally prejudiced by the delay occasioned by the defendant's absence, regardless of whether the period of delay began before or after the filing of the notice of appeal.

The distinction between a case in which the defendant became a fugitive after the appeal was filed and

one in which the defendant became a fugitive (and was recaptured) before the filing of the appeal is particularly insignificant in a case such as this one. In this case, the only reason petitioner's fugitivity did not extend into the appeal period is that a notice of appeal was not filed at the time petitioner was first sentenced. Petitioner was sentenced *in absentia*, and his counsel apparently chose not to file a notice of appeal on his behalf within ten days of the sentencing. If counsel had done so, the court of appeals presumably would have dismissed petitioner's appeal from his conviction on the authority of this Court's decisions from *Smith* through *Molinaro*, and petitioner would not have had any right to reinstatement of the appeal when he was captured 11 months later.

Because petitioner was scheduled to be sentenced on June 15, 1989, and (if he had appeared for sentencing) would have had to file a notice of appeal within 10 days of that date, it was only petitioner's decision not to appear for sentencing that kept his case from proceeding to the appellate stage. Because petitioner's failure to appear and his failure to file a notice of appeal at that time are the only factors that distiguish petitioner's case from the case of a defendant who appeared for sentencing, filed a notice of appeal, and absconded the following day, it was reasonable for the court of appeals to treat petitioner's 11-month post-trial period of fugitivity in exactly the same manner that it would have treated a similar period following the filing of a notice of appeal. Petitioner cannot, by his misconduct, create the conditions that artifically kept his case pending in the district court, and then use the fact that his case had not been pending before the court of appeals while he was a fugitive to fend off a motion to dismiss his appeal.

2. *The Rule Applied by the Court of Appeals in This Case Was Not Unduly Broad*

a. Although petitioner challenges the court of appeals' dismissal order in several respects, he does not suggest that a court may never dismiss the appeal of a former fugitive. Rather, he suggests that the courts' authority must be exercised on a case-by-case basis, and that an appeal may not be dismissed unless concrete "prejudice" results from the defendant's flight. Pet. Br. 7, 11.

This Court should not require courts of appeals to make a finding of prejudice before dismissing a fugitive's appeal. Other rules governing conditions on taking appeals do not require a showing of prejudice before an appeal can be dismissed. The timing requirements imposed by the Federal Rules of Appellate Procedure for filing a notice of appeal or filing a brief can be applied regardless of whether a particular default has resulted in specific prejudice to the court or to the opposing party. And, as petitioner implicitly concedes, the *Molinaro* rule authorizing dismissal of appeals of defendants who flee during the pendency of an appeal does not require proof of prejudice before a dismissal order may be entered in a particular case. Indeed, one reason often advanced for formulating a general rule is to avoid the need to establish a special justification for a particular action in every case. See *Arizona* v. *Roberson*, 486 U.S. 675, 681-682, (1988); *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 351 (1982); *Weinberger* v. *Salfi*, 422 U.S. 749, 772-777 (1975); *id.* at 777 ("[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban

all prophylactic provisions.") It is enough to satisfy the requirement of reasonableness that the legitimate concerns that the rule seeks to promote are generally implicated by cases falling within the class covered by the rule. And, for the reasons given above, that standard is fully satisfied by the rule of dismissal applied by the court of appeals in this case.

In any event, even if some showing of prejudice from the defendant's flight is a prerequisite for dismissal, there was ample justification for the court of appeals' decision to dismiss petitioner's appeal. Contrary to petitioner's suggestion (Br. 12), the delay caused by his absence was not without adverse effect on the appellate process. As already noted, entertaining petitioner's appeal would have forced the court of appeals to consider petitioner's claims apart from the closely related claims of his co-defendants. Although, as petitioner points out (*ibid.*), his appeal was unlikely to result in further proceedings at the trial level (thus obviating any prejudice to the government upon retrial), petitioner's flight did require the trial court, almost a year after sentencing petitioner *in absentia*, to entertain his motion to vacate that sentence and then to resentence him—a wasteful expenditure of judicial time and resources. Moreover, the court of appeals was entitled to take into consideration that petitioner did not return voluntarily but rather was recaptured after effort and expense by the government.

To restrict the *Molinaro* rule to cases in which the appeal is pending when the defendant becomes a fugitive would mean that even after a defendant such as petitioner is captured, he would be entitled to resentencing and to an appeal on exactly the same terms that he would have enjoyed had he never taken flight

in the first place. Such a rule would encourage flight between the time of conviction and the time of sentencing, when there would be no risk of losing the right to appeal. It would therefore disserve the interest in "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders," which this Court has identified as legitimate objectives of a fugitive-dismissal rule. *Estelle* v. *Dorrough*, 420 U.S. at 537. In the case of a defendant facing a very long sentence on the offense of conviction, the risk of prosecution and consecutive sentencing for bail jumping may not be a sufficient deterrent to flight.[5] A defendant in petitioner's position, whose co-defendants are pursuing an appeal, can abscond, wait until the court decides the co-defendants' appeals and then, if

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[5] Petitioner claims that, since he has already been punished for his flight by imposition of a separate term of imprisonment, dismissal of his appeal constitutes a duplicative sanction and an unnecessary vindication of the court's authority. Br. 12-13. However, dismissal of a former fugitive's appeal because of flight is no more a "punishment" than is dismissal of such an appeal for failure to meet the filing deadline. Regardless of whether a fugitive is separately punished, the courts are entitled to formulate rules to promote respect for and obedience to the judicial system, and to ensure its efficient and orderly operation. See *United States* v. *Puzzanghera*, 820 F.2d at 27 (noting that dismissal of defendant's appeal was justified despite the fact that he was "subject to separate punishment for the escape" because his conduct had "burdened this court with additional time-consuming activities"). Subjecting fugitives to criminal sanctions as well as to the threat of dismissal will have the desirable—and permissible—effect of making flight an even "less attractive option." *United States* v. *Persico*, 853 F.2d at 138. Therefore, petitioner's separate prosecution for escape should have no bearing on whether the court of appeals may dismiss his appeal.

their cases turn out well, return for his own sentencing and appeal. That is precisely the sort of manipulation that this Court in its decisions from *Smith* through *Molinaro* has sought to combat.

b. Petitioner implies (Br. 8-11) that this Court cannot uphold the judgment of the court of appeals without endorsing a "rule of automatic, mandatory dismissal" of appeals by former fugitives who flee before sentencing and return before filing their appeals. He claims that the Eleventh Circuit has established such a rule in previous cases in which it dismissed appeals filed by defendants who fled during trial, see *United States* v. *London*, *supra*, or after conviction, see *United States* v. *Holmes*, *supra*, and were recaptured prior to filing an appeal.

The validity of the court of appeals' decision in this case does not turn on whether it would be proper to dismiss the appeal of every former fugitive who returned before filing his appeal. Like this case, both *London* and *Holmes* involved fugitives who were absent for lengthy periods (two years in *Holmes* and three years in *London*) and who were returned to custody involuntarily. The court in those cases, as in this case, did not hold that the same rule would necessarily apply to a defendant who became a fugitive for a very brief period and returned voluntarily before the filing of the appeal, any more than this Court would consider itself bound by its decisions from *Smith* to *Molinaro* to dismiss the case of a defendant who absconded for only a brief period during the time the appeal was pending.

Petitioner suggests that, because the court of appeals in this case dismissed petitioner's appeal without reference to the particular facts of this case, it must have intended to adopt a sweeping, absolute rule

of dismissal for every fugitive defendant, regardless of the circumstances of the case. That, however, is not a fair inference from the court's unelaborated orders. The court was fully apprised of the particular facts of this case, through detailed briefing, before it entered the two orders at issue here, see J.A. 66-77, 79-92, and the dismissal order can therefore be assumed to have taken the facts of the case into account.

Even if the court of appeals would apply its rule of dismissal rigidly in every case of flight by a defendant at some point during the judicial process,[6] that would not render the rule unreasonable as applied to petitioner, and it would not give petitioner the right to benefit from the possible unreasonableness of the

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[6] The dismissal rule that the Eleventh Circuit announced in *Holmes* is not absolute. First, in *Holmes* itself the court made clear that the rule does not foreclose an appeal challenging the lawfulness of the sentence; it bars only a challenge to the underlying conviction. *Holmes*, 680 F.2d at 1373; see also *London*, 723 F.2d at 1539. Moreover, one commentator has concluded that the rule in *Holmes* was not intended to be inflexible, even with respect to appeals from the underlying conviction. See Grippando, *Fear of Flying—The Fugitive's Fleeting Right To A Federal Appeal*, 54 Fordham L. Rev. 661, 689 n.161 (1986). "The very fact that the [*Holmes*] court qualified its statement [explaining the rationale for dismissal] by noting that delay precludes a meaningful appeal 'in many cases,' rather than all cases," suggests that the court did not lay down "a blanket rule of dismissal." *Id.* at 689 (footnote omitted). Certainly, there is nothing in the brief orders of dismissal in this case to indicate that the court intends to apply *Holmes* in an inflexible manner and to order dismissal regardless of the reasons for the defendant's flight, the period of his fugitivity, or the circumstances of his return. Finally, the Eleventh Circuit has not foreclosed a former fugitive from pursuing a collateral attack on his conviction on grounds that would be available to a defendant who failed to perfect his right to direct review.

rule as applied to some hypothetical third party. See *Estelle* v. *Dorrough*, 420 U.S. at 540 (questioning how the defendant, who was sentenced to 25 years' imprisonment, could assert an alleged irrationality in the Texas statutory scheme that would affect only persons sentenced to 60 years' imprisonment or more). Because the Eleventh Circuit's fugitive-dismissal rule is reasonable as applied to a defendant in petitioner's position, the judgment of that court dismissing the appeal should be upheld.[7]

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[7] At several points in his brief, petitioner notes that the court of appeals held the evidence insufficient to support the conviction of his co-defendant Osvaldo Becerra-Flores, the other crewman on the *Wilfred*. Petitioner argues that it would result in a miscarriage of justice to dismiss his appeal when a similarly situated defendant has been released. If a rule of dismissal is valid, however, it must be valid not only for defendants whose appeals would have failed, but also for those whose appeals would have succeeded. The consequence of forfeiture of the right to appeal is that the defendant must be content with the judgment of a jury and a single judge rather than the judgment of an appellate court. In any event, if the sufficiency of the evidence against petitioner is relevant, we submit that it is by no means clear that the court of appeals resolved Becerra-Flores' case correctly. The evidence was sufficient to show that the *Wilfred* was in the Cay Sal area during the time that the bales of contraband were dropped into the water and then hauled onto the shore, and that the *Wilfred* then departed the area under circumstances suggesting flight. Footprints were seen on the beach between the bales and the area of the water where the *Wilfred* was seen. Moreover, when the *Wilfred* was stopped, the crew had no other convincing explanation for their presence in the area. From that evidence, and the fact that only the three defendants made up the crew of the *Wilfred*, the jury could permissibly conclude that the crew of the *Wilfred* transported the bales onto the shore and that each of the defendants participated in the drug conspiracy charged in the indictment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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STATEMENT OF THE CASE

The government implies that it asked the court of appeals to exercise its discretion to dismiss Petitioner's appeal, under a theory of waiver. *Brief of United States*, p.5, ¶3; pp.8, 26-28. This implication fails to capture the true thrust of the government's argument to the court of appeals, where the government argued that Petitioner "cannot now challenge his conviction . . . " and he is "precluded from appealing his conviction. Consequently, this Court should dismiss the appeal." J.A. 70-71. Indeed, the government's argument was couched in absolute and automatic terms, bordering on a jurisdictional objection: "Appellant, who became a fugitive after being convicted by a jury and before sentencing, cannot now challenge his conviction on appeal." J.A. 70. The court of appeals summarily dismissed without any indication that it exercised discretion, "Appellee's motion to dismiss is GRANTED." J.A. 78.

When Petitioner asked the court of appeals to reconsider dismissal of the appeal, he asked the court to exercise its discretion based upon the facts and circumstances of this case. J.A. 79-84. Once again the government relied upon the near-jurisdictional holding of *Holmes-London*:

> Under the holding in *Holmes*, he is precluded from challenging his 1989 conviction . . .
>
> • • •
>
> According to well-established case law, appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction.

J.A. 88. Based upon this argument, the court of appeals ruled, "Appellant's motion to reinstate appeal is DENIED." J.A. 93.

ARGUMENT

In a complete departure from its arguments before lower courts, the government now freely concedes that the appeal of a former fugitive may not be dismissed automatically. Now, for the first time, the government acknowledges that a decision to dismiss the appeal of a former fugitive must be based upon the court's discretion, considering relevant factors on a case-by-case basis. To this end, the government has conceded the premise of Petitioner's argument before the Court.

The only issue which remains, then, is whether the court of appeals abused its discretion by dismissing the present appeal. Under the particular facts of the present case, it was an abuse of discretion to dismiss the Petitioner's appeal.

I. THE GOVERNMENT HAS CONCEDED THAT A FORMER FUGITIVE DOES NOT AUTOMATICALLY FORFEIT THE RIGHT TO APPEAL HIS CONVICTION.

The Nature of the Government's Concession.

In the district court and in the court of appeals, the government contended that the defendant was "precluded" from an appeal of the judgment of conviction because he was a former fugitive, under the Eleventh

Circuit precedent of *Holmes*[1] and *London*[2]. The government's argument, and the courts' rulings, left no room for discretion.[3] The court of appeals dismissed the appeal on this ground and refused to reinstate the appeal, offering nothing more than a perfunctory order, never indicating it exercised discretion.

The government has now abandoned its argument that Petitioner's appeal of his conviction was "precluded" by Eleventh Circuit precedent. Instead, it has made both explicit and implicit acknowledgments that a former fugitive does not automatically waive the right to appeal his conviction. The concession comes in four forms: (A) the government's restatement of the question presented, (B) the government's reliance upon *Thomas v. Arn*[4], (C) the government's complete reliance on precedent which holds that the decision to dismiss is within the court's discretion, and (D) the government's argument that the *Holmes-London* precedent is not a rigid, automatic rule of dismissal. The reason for the concession is apparent – an automatic rule precluding direct appeal of the conviction of a former fugitive is indefensible.

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[1] *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983).

[2] *United States v. London*, 723 F.2d 1538 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

[3] J.A. 47-48, 69-71, 78, 87-89, 93.

[4] 474 U.S. 140 (1985).

A. Concession in the Government's Restatement of the Question Presented.

Based upon the government's contention in the lower courts, Petitioner filed the present petition for writ of certiorari, presenting the question: Whether a former fugitive from sentencing must automatically forfeit the right to appeal his conviction. The first indication of the government's concession appears on the first page of its brief, in which it restated the issue:

> Whether a court of appeals *may* dismiss an appeal by a convicted defendant who fled following his conviction but was recaptured and returned to custody 11 months later.

(emphasis added). *Brief of United States*, p. I. Backing away from its earlier contention that the appeal was precluded by virtue of the defendant's prior fugitive status, the government now couches its argument in the permissive "may", defending the dismissal decision as if it was an exercise of discretion.

To the extent the government now concedes that the dismissal decision must be based upon discretion, the government has adopted the position advanced by Petitioner from the outset. To the extent the government presently suggests that the dismissal decision was presented to the Eleventh Circuit, and decided by that court as a matter of discretion, the government's position lacks candor.

B. Concession in Government's Reliance Upon *Thomas v. Arn.*

By relying extensively upon this Court's decision in *Thomas v. Arn*[5], the government is compelled to concede that the decision to dismiss the appeal of a former fugitive is, by necessity, a matter of judicial discretion. In *Arn*, the Court upheld the Sixth Circuit's use of supervisory power to dismiss appeals due to procedural default, where a defendant failed to file timely objections in the district court as required by the Federal Magistrate's Act. The Court, however, took special account of the manner in which the supervisory power is exercised, finding that the practical effect of the rule is not to restrict automatically appellate court jurisdiction:

> [P]etitioner's first contention – that the Court of Appeals has refused to exercise jurisdiction that Congress granted it – is simply inaccurate. The Court of Appeals expressly acknowledged that it had subject-matter jurisdiction over petitioner's appeal. [citation omitted]. The Sixth Circuit has also shown that its rule is not jurisdictional by excusing the procedural default in a recent case. . . . We therefore conclude that neither the intent nor the practical effect of the Sixth Circuit's waiver rule is to restrict the court's own jurisdiction.

Thomas v. Arn, 474 U.S. at 146. In a footnote, the Court observed similar waiver rules exist in other circuits, but "[i]n none of these cases have the courts spoken in jurisdictional terms." *Id.* at 146 n.4. Upholding the waiver

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[5] *Id.*

rule, the Court "emphasize[d] that, because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interest of justice." *Id.* at 155.

Unlike in *Arn*, the rule of waiver contained in the Eleventh Circuit's *Holmes-London* precedent effectively restricts the court's jurisdiction. Both the government and the court of appeals speak in terms of "abandoned rights", where a former fugitive is "precluded from appealing his conviction", and where an appellant "cannot now challenge his conviction." And, unlike in *Arn*, the government cannot point to a single instance in which the *Holmes-London* rule of waiver was interpreted to excuse an appellant's prior fugitive status.[6]

Since the waiver rule of *Holmes-London* effectively limits jurisdiction, it cannot be defended by the Court's decision in *Arn*. By the terms of *Arn*, the Eleventh Circuit's rule is indefensible. So the government has attempted to disguise *Holmes-London* and the ruling below as mere exercises of discretion. But any such argument is contradicted by the holding of *Holmes-London*, the motion practice of the government in the courts below, the perfunctory orders of the court of appeals, and the historical application of the rule to "preclude" appeals of convictions.

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[6] If anything, the Eleventh Circuit's interpretation of the *Holmes* fugitive dismissal rule has become jurisdictional. *Cf. United States v. DiBernardo*, 880 F.2d 1216, 1229 (11th Cir. 1989) ("If DiBernardo is a fugitive, then the district court does not have jurisdiction to grant his motion for a new trial.")

C. Concession in Government's Citations of Authority.

The government's brief relies upon 29 decisions, nearly all of which were addressed in Petitioner's initial brief. Other than *Holmes* and *London*, not one of the decisions cited by the government mandates or allows automatic dismissal of the appeal of a former fugitive. Each decision exercises discretion based upon the facts and circumstances of the given case.

D. Concession in Government's Present Interpretation of Eleventh Circuit's *Holmes-London* Precedent.

The holdings of *Holmes* and *London* are unmistakable: "We hold that a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters beyond his control. * * * We hold that Holmes, by becoming a fugitive following his convictions, abandoned his right to pursue this appeal."[7] "The rationale of *Holmes* guides the decision in the present case to the same legal conclusion. It would be anomalous to hold that Holmes lost his right to appeal by fleeing after conviction but that London retains his right to appeal because he fled during trial."[8]

Unable to harmonize *Holmes* and *London* with other federal precedent, the government grasps for any authority which might interpret the Eleventh Circuit dismissal

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[7] *United States v. Holmes*, 680 F.2d at 1373-74.

[8] *United States v. London*, 723 F.2d at 1539.

rule as other than absolute. Without case law to support this interpretation, the government relies upon a footnote in an article written by a young lawyer[9] and twists his actual words to make them say something they do not. In the footnote referenced by the government, the author, Mr. Grippando, said:

> The language of the *Holmes* court is, in some parts of the opinion, sufficiently absolute to suggest that the court intended to establish an automatic rule of dismissal for fugitives' appeals. *See id.* at 1373 ("We hold that a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control."); *id.* at 1374 ("We hold that Holmes, by becoming a fugitive following his convictions, abandoned his right to pursue this appeal.")

Id. at 690 n.161. Having quoted what *Holmes* holds, Mr. Grippando then stated that his interpretation "in the text of this Article, however, comports with the federal courts' well established view that dismissal under *Molinaro*, on which *Holmes* relied, is discretionary, not mandatory." *Id.* Rather than support the government's conclusion that "one commentator has concluded that the rule in *Holmes* was not intended to be inflexible, even with respect to appeals from the underlying conviction"[10], Mr. Grippando was clearly forcing harmony between *Holmes* and

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[9] Grippando, *Fear of Flying – The Fugitive's Fleeting Right To A Federal Appeal*, 54 Fordham L. Rev. 661, 698 n.161 (1986), cited at *Brief of United States*, p. 27 n.6.

[10] *Brief of United States*, p. 27 n.6.

all other federal precedent, to advance his personal thesis that "courts should be more circumspect in dismissing criminal appeals based on the defendant's flight . . . [C]ourts should adopt a more flexible balancing test in considering whether to dismiss a former fugitive's appeal." *Id.* at 691.[11]

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[11] Ironically, the thesis of Mr. Grippando's law review article is completely contrary to the government's position in this case. His thesis, which supports petitioner's claim, is summarized in a single paragraph:

> III. RECOMMENDED APPROACH TO FUGITIVES' AND FORMER FUGITIVES' APPEALS
>
> Because federal courts have a "virtually unflagging obligation" to exercise their appellate jurisdiction, and because the exercise of an inherent power is proper only if necessary to the exercise of all others, courts should be more circumspect in dismissing criminal appeals based on the defendant's flight. In particular, courts should distinguish between defendants who flee after filing a notice of appeal and are not in custody at the time the government moves for dismissal – fugitives – and defendants who flee before seeking appellate review and are within custody at all times during the pendency of their appeal – former fugitives. As to fugitives, a bright line rule of unconditional dismissal with prejudice is appropriate, since the appellant's flight is a direct affront to the appellate court and jeopardizes the viability of the appellate system. As to former fugitives, however, the integrity and viability of the appellate court are not necessarily implicated. Therefore, courts should adopt a more flexible balancing test in considering whether the dismiss a former fugitive's appeal, . . .

Id. at 691. [footnotes omitted].

Left with no authority which interprets *Holmes-London* as a rule of discretion, the government nevertheless speculates about hypothetical applications of the Eleventh Circuit rule:

> It is entirely possible that the Eleventh Circuit would not dismiss the appeal of a defendant who became a fugitive for only a short period and voluntarily returned at a time that had no effect on the disposition of the case in the court of appeals.

Brief of United States, p. 8. The government's speculation is unsupported by the plain language of the decisions, the government's motion practice in the lower courts, or by the orders of the court of appeals.[12]

To be sure, the government acknowledges – or, more aptly, it concedes – that a rule requiring dismissal of the appeals of former fugitives cannot be rigid or automatic. To be sustained as reasonable, such a rule must be based upon thoughtful discretion, considering the facts and circumstances of the given case. Despite its concession, the

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[12] The government asserts that the court of appeals' unelaborated "dismissal order can be assumed to have taken the facts of the case into account." *Brief of United States*, p. 27. The assertion is unreasonable when one considers the government's argument to the court of appeals. In that court, the government moved to dismiss the appeal solely on the ground that the defendant's prior fugitive status "precluded" an appeal. Never once did the government concede to that court that the facts of the case could bear upon the dismissal decision. The court of appeals provided no insight into its decision-making process through its perfunctory order, so it is unfair to assume that the court granted the motion to dismiss on different grounds than were raised in the government's motion.

government fails to apply the specific facts of this appeal to the recognized issues of discretion. When properly applied, it is clear that denial of Petitioner's right of appeal was an abuse of discretion.

II. THE DISMISSAL OF PETITIONER'S APPEAL PURSUANT TO THE *HOLMES-LONDON* PRECEDENT WAS AN ABUSE OF DISCRETION WHICH CANNOT BE DEFENDED AS A REASONABLE EXERCISE OF THE ELEVENTH CIRCUIT'S SUPERVISORY POWER.

A. Dismissal Was An Abuse of Discretion.

Petitioner contends that the decision to dismiss the appeal of a former fugitive should not be automatic, but should be based on discretion exercised in each case individually. The government seemingly has no dispute with this approach, agreeing that "the question for decision in this case reduces to whether it is reasonable for a court of appeals to extend the fugitive-dismissal rule to a case such as this one." *Brief of United States*, p. 12.

To effect the appropriate discretionary analysis, Petitioner has offered three broad categories which encompass all potential issues of concern. *Brief of Petitioner*, pp. 15-17. The government does not dispute or discuss these categories or issues specifically, instead sprinkling issues of concern throughout its brief. The issues raised by the government are, therefore, reorganized as follows, so that the original analytical framework is not lost.

1. **Impact in appellate court.** The government enumerates two factors which should be considered as

impacting on the appellate court: (1) "fugitivity" is disruptive, causing delay and duplication of court effort; (2) a court should not accord a fugitive a forum to litigate when the defendant has not subjected himself to the court's ultimate judgment. These issues do not apply to the present appeal.

The sole issue in Petitioner's appeal involves the sufficiency of evidence to support the convictions.[13] The record of proceedings has been transcribed, prepared and filed with the court of appeals. The court can entertain a meaningful appeal. The court of appeals has not previously undertaken to analyze the sufficiency of evidence against Petitioner, since he was a fugitive during the appeal of his co-defendants. *See United States v. Mieres-Borges*, 919 F.2d 652, 654 n.1 (11th Cir. 1990). If Petitioner had appealed with his co-defendants, the court of appeals would have had to undertake a separate sufficiency-of-evidence analysis at that time. Thus, the court of appeals will undertake the same consideration for this defendant that it would have otherwise, albeit at a later time.[14]

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[13] *See* Brief of Appellant, filed in the Eleventh Circuit Court of Appeals, April 24, 1991.

[14] In a somewhat contradictory argument, the government offers that a former fugitive remains entitled to "pursu[e] a collateral attack on his conviction on grounds that would be available to a defendant who failed to perfect his right to direct review." *Brief of United States*, p.27 n.6. This alternative invokes greater duplication of judicial effort than if the defendant's appeal is heard presently. Collateral attack includes additional proceedings in the trial court and very likely requires the same issues to be addressed in appellate proceedings thereafter, at the instance of whichever party loses in the trial court. Judicial efficiency, it would seem, is best served by having the sufficiency of evidence claim decided in the present appeal.

The defendant has been in custody throughout the entirety of his appeal. He has, therefore, remained subject to the ultimate judgment of the appellate court.

2. **Impact in potential post-appellate proceedings.** The government enumerates only one issue impacting upon post-appellate proceedings, the prejudice which may be sustained by the prosecution in the event a retrial is necessitated. The concern was alleviated in Petitioner's initial brief. If the conviction is reversed on appeal due to insufficiency of evidence, there can be no retrial. *Burks v. United States*, 437 U.S. 1, 18 (1978). The government cannot be prejudiced since it will have no need to call witnesses whose memories have faded, nor to produce evidence which may be lost. If the appeal is unsuccessful, Petitioner is already in custody for the court to effect its judgment and commitment.

3. **Vindicating the authority of law.** Most of the government's justification for a fugitive dismissal rule falls under the general category of the need to vindicate the court's authority. First, it suggests that the rule discourages escapes and encourages voluntary surrenders by escapees. Second, the rule reflects a determination not to extend the benefits of appellate review to fugitives, who have displayed contempt for the court by fleeing. If these issues standing alone are sufficient to allow dismissal of the appeal of a former fugitive, then no former fugitive would ever be allowed an appeal, regardless of other factors. Even the authority relied upon by the government belies this approach.

The precedent relied upon by the government makes clear that these two factors should not alone justify dismissal of an appeal of a person who is then in custody. Each of the decisions acknowledges the need to consider additional facts which, when stirred together, provide a case-by-case basis for deciding when to dismiss an appeal.

In *United States v. Puzzanghera*, 820 F.2d 25 (1st Cir. 1987), the court dismissed the appeal of a defendant who escaped while his appeal was pending. Despite this direct affront to the appellate court, the court of appeals continued to recognize the importance of considering all of the equities before dismissing the appeal of a former fugitive:

> [W]e shall consider the circumstances of each situation, as we have here, before dismissing a recaptured escapee's appeal. We can imagine very unusual cases where equities pertaining to the escape and recapture, *or to the merits of the appeal*, could induce us to retain jurisdiction.

Id. at 27 (emphasis added). Thus, the precedent relied upon by the government acknowledges that the merit of the appeal is an important factor to be weighed before dismissing the appeal.

So too are the court's ability to entertain a meaningful appeal and the possibility that a successful appeal will require a retrial. Thus, in *United States v. Parrish*, 887 F.2d 1107 (D.C. Cir. 1989), the court exercised discretion against hearing an appeal because no meaningful appeal could be entertained, and, if successful, would have required a retrial many years later. Parrish had been a fugitive for 14 years. Some of the factors which guided

the court's discretion to dismiss are: there was no transcript of the trial proceedings, the notes of the court reporter were destroyed after ten years, one of the court reporters is dead, the whereabouts of the other was unknown, the defendant's prior lawyer was retired and maintained no records of the case, and the government would face severe obstacles gathering evidence for a retrial.

United States v. Persico, 853 F.2d 134 (2nd Cir. 1988) was dismissed because the defendant was a fugitive for seven years and sought to appeal an evidentiary ruling which, if successful, would have required a retrial. The court of appeals "exercise[d its] discretion to decline to reach the merits of the claimed error" assigning as one reason "the possibility of prejudice to the prosecution . . . by forcing the government to reprosecute him long after memories have dimmed and evidence has been lost." *Id.* at 137, 138.

The decision to dismiss Petitioner's appeal is also governed by the various factors it presents. The complete record on appeal and Petitioner's initial appellate brief are before the court of appeals. The appeal raises a single issue, the sufficiency of evidence, which has great merit since the court of appeals has already ruled that there is insufficient evidence to convict an identically situated co-defendant.[15] The government has the wherewithal to

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[15] The government continues to dispute the decision of the court of appeals in *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), contending that "it is by no means clear that the court of appeals decided Becerra-Flores' case correctly." *Brief of United States*, p. 28 n.7. Since this Court has denied further

defend the propriety of the conviction, if it can, through reference to the trial record. A meaningful appeal is possible. If the appeal is successful, there can be no retrial, obviating any prejudice to the government which might result if a retrial were allowed.

Also militating against dismissal of the appeal is that the government and district court have already vindicated the authority of law. Petitioner has been separately punished for being a fugitive. He was indicted for, convicted of, and sentenced to a consecutive term of 21 months imprisonment for contempt of court and failure to appear.

Under the circumstances presented in this case, it is an abuse of discretion for Petitioner's appeal to be dismissed.

B. Dismissal of Petitioner's Appeal Pursuant to the *Holmes-London* Precedent Cannot Be Defended As A Reasonable Exercise of the Eleventh Circuit's Supervisory Power.

The supervisory power of the courts of appeals is limited. It cannot conflict with the Constitution or Acts of Congress. *Thomas v. Arn*, 474 U.S. at 148. The power does

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review of that dispute, 111 S.Ct. 1633 (1991), the dispute is over. Despite the government's dispute, the paltry evidence which convicted petitioner is set forth fully at pp. 3-4 of the *Brief of the United States*. The relevance of the dispute to this proceeding is questionable, since Petitioner has not requested for this Court to decide the sufficiency of evidence issue. His only request is that the Court direct the court of appeals to decide the sufficiency claim on direct appeal.

not permit the courts of appeals to restrict their jurisdiction under the guise of procedural rules governing the management of litigation. *See id.* It does not permit the courts of appeals to dismiss automatically a statutorily granted appeal based upon blanket generalizations. Decisions rendered in the form of supervisory power are subject to account for an abuse of discretion. *Cf. id.* at 148.

The Eleventh Circuit's *Holmes-London* precedent cannot be defended as a reasonable exercise of the supervisory power. As written, and as applied, it imposes an automatic forfeiture of a former fugitive's right to appeal. Assuming, for the sake of argument, that the court of appeals privately exercised discretion on this issue, it was a clear abuse of discretion to dismiss Petitioner's appeal.

CONCLUSION

This Court should issue a writ of certiorari directing the court of appeals to consider the merits of Petitioner's appeal of his conviction.

Respectfully submitted,

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